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(17,002.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 141.

CARRIE MOSS, APPELLANT,

vs.

RICHARD DOWMAN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 27, 1899.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1898, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the second day of May, A. D. 1898, before the Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges, and Honorable Oliver P. Shiras, district judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the fourteenth day of January, A. D. 1898, a transcript of record, pursuant to an appeal allowed by the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of Carrie Moss, appellant, *vs.* Richard Dowman, which said transcript of record is in the words and figures following, to wit:

1 In the Circuit Court of the United States, District of Minnesota, Fifth Division.

CARRIE MOSS, Complainant,
vs.
RICHARD DOWMAN, Defendant. } No. 264. In Equity.

Pleas in the United States circuit court, district of Minnesota, fifth division thereof, in the equity cause numbered 264 and entitled Carrie Moss, complainant, *vs.* Richard Dowman, defendant.

Be it remembered that on the 23rd day of March, A. D. 1897, there was filed with the clerk of said court by Draper, Davis & Hollister, of counsel for complainant, the bill of complaint in the cause entitled Carrie Moss, complainant, *vs.* Richard Dowman, defendant, which said bill of complaint, together with Exhibits "A" to "Q," inclusive, which were filed at the same time, are in words and figures as follows, to wit:

Bill of Complaint.

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

CARRIE MOSS, Complainant,
vs.
RICHARD DOWMAN, Defendant. } No. 264. In Equity.

To the judges of the circuit court of the United States for the district of Minnesota, fifth division:

Carrie Moss, a resident of the county of Cook, in the State of Minnesota, and a citizen of the United States and of the State of

Minnesota, brings this her bill of complaint against Richard Dowman, a resident of said county of Cook, in the State of Minnesota, and a citizen of the United States and of the State of Minnesota, and thereupon your orator complains and says:

1. That your orator is a resident of the county of Cook, in the State of Minnesota, is a citizen of the United States and of the State of Minnesota, over the age of twenty-one years, a *feme sole*, and brings this suit in her own right.

2. That the defendant is a resident of the county of Cook, in the State of Minnesota, a citizen of the United States and of the State of Minnesota, and is sued in his own right.

3. That the claim and complaint of your orator against the said defendant, and the questions involved in this suit, arise
2 under the Constitution and laws of the United States, as will hereafter more fully appear by the facts hereinafter recited, and that the matter in dispute, exclusive of interest and costs, exceeds the sum or value of two thousand dollars ($2,000).

4. That prior to the year 1876 the certain land and premises now officially known and described under the laws of the United States as the southeast quarter (S. E. ¼) of section twenty-two (22) in township sixty-five (65), north of range four (4) west, fourth (4th) principal meridian, were a portion of the unsurveyed public lands of the United States in the State of Minnesota, and were embraced within the territorial limits of the Duluth land district in said State, as fixed and established by the laws of the United States; that during the years 1876 and 1877 the said township was surveyed and subdivided by the United States; that a plat of said survey and subdivision was, upon the sixth day of February, 1878, approved by the proper officer of the United States thereunto lawfully authorized, and thereafter, and during the said month of February, 1878, was filed in the office of the register and receiver of public lands at the said Duluth land office in said State; that by said survey, subdivision, and plat, the said premises became and were, and have ever since remained, the southeast quarter (S. E. ¼) of section number twenty-two (22) of said township, and that said survey and plat, since the said sixth day of February, 1878, have continuously remained and still are the sole official survey and plat of said land and premises. And your orator avers that upon said survey and the filing of said plat the said premises became and were surveyed lands of the United States, and as such became and were and thereafter remained subject to appropriation and entry under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the various acts of Congress supplemental thereto and amendatory thereof, including section twenty-two hundred and eighty-nine (2289) of the Revised Statutes of the United States.

5. That upon the seventh day of May, 1890, one Robert H. Doran made application to the register and receiver of the United States land office at Duluth, Minnesota, to enter as a homestead, under the act of Congress approved May 20, 1862, and the supplemental and amendatory legislation of Congress in the last preceding para-

graph referred to, the said above-described premises, to wit, the southeast quarter (S. E. ¼) of section twenty-two (22) of township sixty-five (65) north of range four (4) west, fourth (4th) principal meridian; that the said Doran at the date of said application was
3 over the age of twenty-one years, had filed his declaration of intention to become a citizen of the United States, as required by the naturalization laws, and was in all other respects a qualified applicant under such legislation of Congress, and entitled thereunder to enter public lands; that the said premises, at the date of said application, were unappropriated, surveyed, public lands of the United States, subject to pre-emption at one dollar and twenty-five cents per acre, were located in one body in conformity to legal subdivisions of the public lands, and contained one-quarter section, or one hundred and sixty acres, and were in all respects of the class of public lands which said applicant was entitled to enter; that the said application of the said Doran, made as aforesaid, was, upon the said seventh day of May, 1890, granted and allowed by the register and receiver of said land office, and the said Doran thereupon, in manner and form as required by the rules and regulations of the proper officers of the United States appertaining thereto, made formal entry of the said premises, all of which will more fully and at large appear from a copy of the said application of said Doran, with endorsement thereon of the register of said land office, filed herewith, marked Exhibit "A," made part hereof, and prayed to be read as a part of this bill, and copy of the receiver's duplicate receipt, or certificate of original entry, issued to the applicant, filed herewith and marked Exhibit "B," and prayed to be read as a part hereof.

Your orator further avers and shows that immediately upon the allowance of said entry, to wit, upon the said seventh day of May, 1890, the same was duly noted and entered by the register and receiver upon all the proper and usual books, plats, and records of their office, including a book of original entries, known as a tract book, kept in accordance with law and the regulations of the Land Department of the United States, for the purpose of showing all appropriations, dispositions, sales and entries of public lands; that in due course of business said entry was also duly returned and reported to the Commissioner of the General Land Office at Washington, District of Columbia, together with the proof upon which it was founded, and in said last-mentioned office was also noted and entered upon all usual and customary books and records showing entries and appropriations of public lands, and the said entry, made as aforesaid, so remained of record in said local office and in the General Land Office from the said seventh day of May, 1890, until the 24th day of October, 1890, when the same was canceled, as hereinafter fully set forth.

And you- orator further avers and shows that by virtue of such entry said premises became and were, from and after the
4 seventh day of May, 1890, legally segregated from the public domain, and appropriated to private use; that such segregation and appropriation, so long as said entry remained uncanceled

upon the records of the United States, absolutely removed and excepted said premises from any further or other entry or disposition, and from any lawful settlement thereon under any law of the United States by any person other than the said Doran, for the purpose of initiating any claim thereto, and that any settlement so made thereon prior to said cancellation was absolutely null, void, and of no effect whatever to confer on such settler any legal or equitable right or claim, either immediately or prospectively, in or to said premises.

6. That at all times since the passage of the act of Congress of May 20, 1862, hereinbefore referred to, there has prevailed and now prevails in the Department of the Interior of the United States, in the United States General Land Office, and in all of the offices of registers and receivers of the United States created by law a well-settled rule, regulation, practice and construction of the said act and of supplemental and amendatory legislation under which any person making entry of public lands under the provisions of said act and supplemental legislation is allowed the full period of six calendar months from and after entry within which to make settlement and to establish a residence upon the tract entered, and to otherwise comply with any of the requirements of said legislation, without forfeiture or liability to forfeiture of any rights acquired by such entry; and your orator further avers and shows that under this rule, regulation, practice and construction, as well as independently under the provisions of said act, the entry of the said Robert H. Doran, made of the lands described, as in the preceding paragraph fully set forth, continued a valid, subsisting, legal entry and appropriation of the same without any further or other act or proceeding upon his part, from the seventh day of May, 1890, to the twenty-fourth day of October, 1890, when the same was cancelled, under the circumstances hereinafter set forth.

7. That upon the twenty-fourth day of October, 1890, within the period of six months from and after the entry of said premises by the said Robert H. Doran, as hereinbefore set forth, and while the said entry was still in full force and effect as a legal and valid segregation and appropriation of said land, your orator, for the purpose and with the intent of extinguishing all the right, title, interest, claim, and demand of the said Doran in and to said land and entry, and to enable your orator to enter and appropriate said premises, contracted and agreed with the said Doran to pay to him, the said Doran, the sum of one thousand dollars ($1,000), providing he, said Doran, would execute and file in the office of the register and receiver of the United States land office at Duluth, Minnesota,
5 a written relinquishment of his claim; that thereupon, to wit, upon the said twenty-fourth day of October, 1890, your orator, in pursuance of said contract, paid to said Doran the sum of one thousand dollars ($1,000) in lawful money of the United States, and the said Doran executed and acknowledged and delivered into the possession of your orator, with full, specific authority and direction for and in his behalf to file the same in the said land office, an assignment and relinquishment to the United

States of all his rights, title, and interest and claim in and to said land, and a request that his said claim and entry should be canceled, which said assignment and relinquishment were endorsed upon the back of the original duplicate receipt or certificate of original entry issued to said Doran upon the seventh day of May, 1890, hereinbefore referred to as Exhibit "B," copy of which said assignment and relinquishment is filed herewith, marked Exhibit "C," and prayed to be read as a part hereof; that thereupon, to wit, upon the said twenty-fourth day of October, 1890, at about the hour of eleven o'clock a. m., and not later than eleven o'clock and thirty minutes a. m., your orator, in compliance with the authority and direction of the said Doran, as herein set forth, filed said original duplicate receipt, together with said assignment and relinquishment, in the office of the register and receiver of public lands at Duluth, Minnesota, and, simultaneously with such filing, and as a part of one and the same act, tendered to the register and receiver of said office, and filed therein, her application to enter the said premises, as a homestead, under the said act of Congress approved May 20, 1862, and the legislation of Congress supplemental thereto and amendatory thereof, copy of which said application of your orator is filed herewith, marked Exhibit "D," and prayed to be read as a part hereof; that thereupon, on the said twenty-fourth day of October, 1890, immediately upon the filing of said relinquishment and application, without intermission, and as part of one and the same proceeding or transaction, the register and receiver, under and in conformity to the first section of the act of Congress approved May 14, 1880, entitled "An act for the relief of settlers on public lands," cancelled upon their records the said entry, No. 4753, of the said Robert H. Doran, and endorsed said cancellation upon the original duplicate receipt issued to said Doran and filed as aforesaid; that the register of the said land office, upon said last-mentioned date, immediately after said cancellation, and also as a part of one and the same transaction or proceeding, certified, in the usual form, that the application of your orator was for lands of the class which your orator was entitled to enter, and that there was no valid adverse right to the same, as will more
6 fully appear by reference to a copy of said certificate, being part of Exhibit "D" to this bill; and that thereupon, upon said last-mentioned date, immediately after the making of said certificate, and also as a part of one and the same transaction, the application of your orator to enter said premises was allowed by said register and receiver, such entry was made, and the same was duly noted by said register upon the proper tract book, plat, registry of entries, and other records of said land office, and a duplicate receipt or certificate of an original entry in the usual form was issued to your orator, copy of which duplicate receipt or certificate is filed herewith, marked Exhibit "E," and prayed to be read as a part hereof.

Your orator further avers that in due course of business her application and entry of said premises was by the register of said land office duly reported and returned to the General Land Office, to-

gether with the proof upon which it was founded, and was in that office, in the tract book thereof, and upon all other records used therein to designate or record segregations, entries, or appropriations of public lands, duly noted, entered, and recorded, and so thereafter remained until the same was subsequently canceled, under the circumstances hereinafter set forth.

Your orator further avers that at the date of her said application and entry she was in all respects qualified, under the laws of the United States, to make a homestead entry of public lands; that she was a *feme sole*; that she had arrived at the age of twenty-one years; that she was a citizen of the United States; that her application was made for her own exclusive use and benefit, and for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person; that she had not theretofore had the benefit of the homestead laws; that she was not the proprietor of more than one hundred and sixty acres of land in any State or Territory, and that she had not, subsequently to August 30, 1890, or at any time, entered or filed upon or set up any claim whatever to any lands under the laws of the United States the aggregate quantity of which, together with that about to be entered, would be more than three hundred and twenty acres.

Your orator further avers that at the time of making her application for entry as hereinbefore set forth, simultaneously with such application, and as a part of the same, she made affidavit before the receiver of said land office that she was a native-born citizen of the United States, over twenty-one years of age; that her said application was made for the purpose of actual settlement and cultivation;

7 that said entry was made for her own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever, and that she had not theretofore had the benefit of the homestead laws, copy of said affidavit being filed herewith, marked Exhibit "F," and prayed to be read as a part hereof.

Your orator further avers that at the time of her said application, simultaneously therewith, and as a part thereof, she made affidavit before the receiver of the said land office that since August 30, 1890, she had not entered under the land laws of the United States or filed upon a quantity of land which, with the tracts then sought to be entered, would make more than three hundred and twenty acres, copy of which affidavit is filed herewith, marked Exhibit "G," and prayed to be read as a part hereof.

Your orator further avers that at the date and time of her said application the said tract was surveyed, unappropriated, public land of the United States, subject to pre-emption at a dollar and twenty-five cents per acre; that the amount of said land so entered was one quarter section, or one hundred and sixty acres; that the same was located in one body, in conformity to the legal subdivisions of public lands, and that your orator, at the time of such application, tendered and paid to the register and receiver all the fees, compensation, and commissions required by law.

8. That at the date of her entry of said premises as hereinbefore

described your orator was employed as a teacher in the public schools of the State of Michigan, at Grand Rapids, in said State; that after making such entry at Duluth, Minnesota, she returned temporarily to Grand Rapids, where she completed her term of service in said schools, on or about the first day of April, 1891; that upon the sixth day of April, 1891, within the period of six months from and after her said entry, she started from Grand Rapids, in said State, for the land so entered, for the purpose of making settlement and establishing her residence thereon, and otherwise complying with the provisions of law; that she was accompanied from Grand Rapids by one Timothy B. White and his wife, whom your orator employed as laborers and servants at a compensation of fifty dollars per month and expenses; that your orator was joined en route to said land by one John B. Bisbee, who had been her business agent for several years, and who was then and there employed by your orator at a salary of fifty dollars per month and expenses to accompany your orator and the said White and his wife to said land, and to assist your orator in making settlement thereon and improvement thereof; that before reaching said land your orator also employed one Fred Gagnon to ac-
8 company the party, as a laborer, at a salary of fifty dollars per month; that the nearest and most available route to said land from Grand Rapids, and the one adopted by your orator, was from Grand Rapids by rail to Saulte Ste. Marie, Michigan, thence by rail to Port Arthur, province of Ontario, Canada, thence by rail to a point in said province of Ontario west of Port Arthur, thence by horses and teams with drivers through forests and over frozen rivers and lakes to a point about five miles from the said land, thence on foot to the said land; that your orator, with said assistants employed as above, left Grand Rapids, as hereinbefore stated, April sixth, 1891, travelled with said employees over said route, carrying with her a large quantity of household goods, furniture, utensils, clothing, and food; that your orator and said employees reached the land, entered as aforesaid, upon the 22d day of April, 1891, within a period of six months after said entry; that your orator immediately, to wit, upon the said twenty-second day of April, 1891, made settlement upon said land, and established a residence thereon in a tent; that she immediately commenced the erection of a comfortable house, which was completed at a cost exceeding the sum of seven hundred dollars, and occupied by her July twenty-second, 1891; that her settlement and residence thus established was made in absolute good faith, and with intent to make the said tract her actual, exclusive, and only residence and home; that from and after the said twenty-second day of April, 1891, your orator, in good faith, and with intent, as aforesaid, continuously and actually resided upon said land, cultivating and improving the same, until on or about the first day of June, 1892, when her actual personal presence thereon temporarily ceased under the circumstances hereinafter set forth; that from April sixth, 1891, to the month of October, 1891, your orator kept in her employ on said land, cultivating and improving the same, all of the persons here-

inbefore mentioned, paid to each and all of them the wages agreed upon as hereinbefore set forth, and during all the balance of said time retained, employed, and paid at said prices nearly all of said persons; that between April twenty-second, 1891, and June first, 1892, your orator had improved said land by the erection of the dwelling-house already described, and by a large storehouse and other outbuildings, and by clearing and cultivating about four acres of the land; that during the entire period above mentioned your orator had furniture and house furnishings upon her claim of at least the value of nine hundred dollars, and that, up to said first day of June, 1892, your orator had actually expended, in the purchase of the relinquishment of said Doran, and establishing and maintaining her residence upon said land, and in cultivating
9 and improving the same, at least the sum of four thousand dollars ($4,000).

9. That upon the twenty-eighth day of November, 1890, the defendant, Richard Dowman, made application to the register and receiver of the land office at Duluth, Minnesota, to enter the premises hereinbefore described, and then covered by the entry of your orator as a homestead under the said act of May twentieth, 1862, and said subsequent legislation of Congress, alleging in his said application that he had made a settlement upon said land on the 19th day of September, 1890, and that he had erected a house thereon, and was in possession of the said tract upon the twenty-fourth day of October, 1890, and thereupon and in consideration of the premises, claimed to be entitled to make homestead entry of said tract. Your orator is informed and believes, and upon such information and belief alleges the fact to be, that the defendant Dowman was not in possession of said land upon the said twenty-fourth day of October, 1890, or during any portion of said day; that he was not present upon or in the immediate vicinity of said land, or any part thereof, at any time during the entire twenty-four hours of said day, and that during said day he made no act of settlement whatever upon said land, and in no way personally connected himself with said tract. And your orator further avers that upon such application and claim of defendant, but without either allowance or disallowance of said application, such further and other proceedings were thereupon had before the said register and receiver and the General Land Office that upon the third day of February, 1892, the Commissioner of the General Land Office directed the said register and receiver to order a hearing before themselves to determine the rights of the respective parties; that such hearing was ordered by the said register and receiver and held, with various continuances, from the fifteenth day of June, 1892, to the twentieth day of July, 1892; that a large amount of testimony was taken by the respective parties; that upon such hearing your orator, by the testimony of many witnesses, established and proved the fact that defendant was not upon said land during any portion of the twenty-fourth day of October, 1890, or, in any event, was not thereon at any hour of said day earlier than two o'clock p. m.; that, as the result of such hearing, the register of said land office held and decided in favor of

your orator, and the receiver of said office in favor of defendant, copies of said decisions being filed herewith, marked respectively Exhibits "H" and "I," and prayed to be read as a part hereof, and that from said decisions, respectively, your orator and the
10 defendant appealed to the Commissioner of the General Land Office.

10. That from and after the twenty-second day of April, 1891, when, as hereinbefore set forth, your orator made settlement and established her residence upon the premises hereinbefore described, until on or about the first day of June, 1892, your orator continued uninterruptedly her actual personal residence, improvement and cultivation of said land, as hereinbefore set forth; that on or about said last-mentioned date she temporarily left said land, leaving, however, thereon all her household goods, furniture, implements, and utensils hereinbefore referred to, to visit Duluth, for the purpose of preparing for and attending the trial or hearing mentioned in the preceding paragraph of this bill, which said trial or hearing was not concluded in the office of the register and receiver until the twentieth day of July, 1892; that after the conclusion of said trial your orator, having then resided upon said land and cultivated and improved the same for the full period of time necessary to entitle her, under section eight of the said act of March twentieth, 1862, and section twenty-three hundred and one of the Revised Statutes of the United States, to make proof of residence upon, settlement and cultivation of said land, to pay for the same, and to obtain the patent of the United States therefor, applied to the register and receiver of said Duluth land office to be allowed to make such proof and payment; that thereupon, upon such application, such further and other proceedings in full and strict compliance with law and all the forms, rules and regulations of the Land Department of the United States were duly and regularly had that, upon the twenty-second day of October, 1892, before the said register and receiver, your orator made, in full and strict compliance with all the forms, rules, and regulations of the Land Department of the United States, full proof of settlement, residence upon and cultivation of said land, as provided by the law granting pre-emption rights; that upon such hearing your orator proved that she had made a settlement in person upon said land, that she had inhabited and improved the same from the twenty-second day of April, 1891, to the date of said proof, that she had erected a dwelling thereon, that she had in all other respects fully complied with the law, and was in all respects qualified thereunder; that at such hearing your orator also filed all affidavits and other papers required by law or regulations to be sworn to, prepared or filed, in order to entitle her to enter said land; and that upon the completion of said proof she tendered to the receiver of the said land office, in payment for said land, the minimum price fixed by law for the quantity of land sought to be entered, to wit, the sum of two hundred
11 ($200) dollars. Your orator further avers and shows that said proof was satisfactory to the said register and receiver, and that the same would have been accepted and entry allowed

except for the pendency of the cause or proceeding between your orator and the defendant referred to in the preceding paragraph of this bill, but that in view of said proceeding the proof so as aforesaid made, and the tender of said payment, were, in accordance with the rule of the General Land Office and Department of the Interior governing such cases, held in abeyance to await the result of such proceeding. And your orator further avers that said proof at all times since it was made has remained in possession of the register and receiver (or) the General Land Office, and that your orator has at all times since said proof been ready to pay, and is now ready and willing to pay, said money to the United States.

Your orator further avers that although, as she is legally advised and believes, it was not incumbent upon her to return to said land, or to live thereon, pending the decision of the cause or proceeding between herself and defendant, or after her final proof as hereinbefore set forth, yet that it has always been and is now her desire and intention to return to the same and make the tract her exclusive residence and home, and that she has only been deterred from so doing by the pendency of said cause or proceeding.

11. That upon the third day of January, 1893, upon consideration of the matter or cause hereinbefore in paragraph 9 of this bill mentioned, and of the appeals, respectively, of your orator and the defendant from the decisions of the register and receiver therein, the Commissioner of the General Land Office affirmed the decision of the register therein in favor of your orator, and reversed that of the receiver, copy of said decision of the Commissioner being filed herewith, marked Exhibit "K," and prayed to be read as a part hereof; and that thereupon defendant appealed from said decision to the Secretary of the Interior, copy of said appeal being filed herewith, marked Exhibit "L," and prayed to be read as a part hereof.

12. That upon the nineteenth day of December, 1894, the Secretary of the Interior, considering said matter or cause, and the said appeal of defendant from the decision of the Commissioner of the General Land Office, and proceeding therein upon certain facts by him found, without authority, and in error of, contrary to, and against law, reversed the said decision of the Commissioner of the General Land Office, and directed that officer to cancel the entry of your orator, and to admit the application of the defendant, copy of said decision being filed herewith, marked Exhibit "M," and
12 prayed to be read as a part hereof. Your orator further avers and shows that in said decision the Secretary of the Interior found, as matters of fact, that an homestead entry of said land was made by the said Robert H. Doran, May seventh, 1890, and remained on record, in full force, and uncanceled, from this last-mentioned date until canceled October twenty-fourth, 1890, upon the relinquishment filed as hereinbefore recited; that upon the said twenty-fourth day of October, 1890, your orator filed the said relinquishment of Doran in the office of the register and receiver, and made homestead entry of said land, and that defendant settled upon said land September nineteenth, 1890, and lived thereon continuously thereafter until November, 1890, with the exception of one absence

from October nineteenth, 1890, to October twenty-fourth, 1890, on which last-mentioned date, but at an hour not found or mentioned in said decision, he returned to the land. Your orator avers and shows that the Secretary in his said decision did not find as a matter of fact that defendant was upon said land upon the twenty-fourth day of October, 1890, at the time of the entry by your orator, or that at any time upon said day defendant made any act of settlement thereon. And your orator avers and shows that upon this finding of fact, and not upon any other material or pertinent facts, the Secretary, in said decision, held as matter of law that although the said entry of Doran segregated the land from the public domain, and during its existence no right could be initiated to the same by settlement thereon, yet that nevertheless, upon the cancellation of said entry, a valid right in defendant as a settler instantly attached, to the exclusion of the entry made by your orator. Your orator avers and shows unto your honors that this last-mentioned finding was error of law; that a settlement or residence, or both, by defendant, if either or both existed in fact, made during the appropriation of said land by the entry of Doran, created no legal or equitable right or claim whatever in defendant which could have attached to the land at date of cancellation of said entry; that upon the cancellation of said entry, simultaneously with the allowance of your orator's application, title to said land vested instantly in your orator, or, if this be otherwise, then that no right could have arisen in defendant except by virtue of an independent act of settlement, made after such cancellation, and before the entry of your orator.

13. That upon the sixteenth day of January, 1895, within the time allowed by the rules and practice of the Department of the Interior for that purpose, your orator filed in the office of the Secretary of the Interior a motion for a review and reconsideration of the said decision of the Secretary in the last paragraph of
13 this bill referred to, copy of which said motion is filed herewith, marked Exhibit "N," and prayed to be read as a part hereof; that upon the twenty-third day of February, 1895, the Secretary of the Interior, in error of, contrary to, and against the law, overruled and denied said motion, copy of his order to this effect being filed herewith, marked Exhibit "O," and prayed to be read as a part hereof; that upon the twenty-sixth day of March, 1895, the said Secretary recalled his said order of February twenty-third, 1895, and granted an application of your orator to file briefs, and for oral argument upon said motion for review, and that thereafter, to wit, upon the twenty-sixth day of August, 1896, the Secretary, still in error of, contrary to and against law, finally overruled said motion, and adhered to his prior decision of December nineteenth, 1894, copy of said last-mentioned decision being filed herewith, marked Exhibit "P," and prayed to be read as a part hereof.

14. That upon the sixteenth day of September, 1896, under and in pursuance of said above-mentioned decisions, orders, and proceedings, the Commissioner of the General Land Office closed said case upon his records, and directed the local officers to cancel the entry of your orator, and to allow defendant to complete his entry,

copy of said action by the Commissioner being filed herewith, marked Exhibit "Q," and asked to be read as a part hereof, and that in pursuance of such decisions, orders, and proceedings, the entry of your orator was, upon the second day of October, 1896, canceled upon the records of the register and receiver, and was thereafter noted as canceled upon the records of the General Land Office, and defendant was allowed to make original homestead entry and final homestead proof and entry under section 2291 of the Revised Statutes of the United States for said land and premises, all in error of, contrary to, and against law.

15. That upon the seventeenth day of March, 1897, under and in pursuance of said above-mentioned decisions, orders, and proceedings, and not under any other authority or pretended authority of law, the United States, through its proper officers, and in error of, contrary to and against law, and to the prejudice of your orator, issued to the said defendant its patent purporting to convey to defendant the hereinbefore-described land and premises.

16. That at the time of your orator's entry of said premises, as hereinbefore described, your orator had no information or knowledge whatever of any settlement or claim of settlement upon said land by defendant, nor of any claim by defendant of any character whatever to said land or claim to the right to enter the same;
14 that your orator never heard of any such claim or pretension on the part of the defendant until long after her said entry, and not until service of notice upon her of the controversy or proceeding hereinbefore referred to, and that your orator believed said land to be not only entirely unoccupied and unappropriated, but also to be absolutely clear of all opposing claims of every kind and description.

17. That prior to the date when your orator made proof of residence upon, settlement, and cultivation of said land as hereinbefore in paragraph 10 of this bill set forth, at said date and at all times subsequent thereto, there was, and now is, a rule of procedure and action in the General Land Office and in all the offices of registers and receivers, and a settled practice therein, under which, in cases of controversy or contest between different claimants for public lands, final proof of residence upon and settlement and improvement of the tract is permitted to be made, under section 2301 of the Revised Statutes of the United States, by any contestant who would be entitled (—) do so except for the pendency of such controversy, which proof when so taken is required under said rule and practice to be held in abeyance to await the termination of said controversy; that under said rule and practice the proof so made by your orator, accompanied by tender of the purchase price prescribed by statute for the lands, as hereinbefore set forth, was the final completion of your orator's claim, and conferred upon her a vested right to a final commuted homestead cash entry, and also to a patent for said tract subject only to the ascertainment of some prior, superior or better right of the defendant, and that except for the misconstruction and error of law made by the Secretary of the Interior upon the facts found by him in his said decision of December 19, 1894, as herein-

before in paragraph No. 12 of this bill of complaint set forth, your orator, under said rule and practice, would have been entitled to and would have been awarded a final commuted homestead cash entry and patent for said land.

18. That the Secretary of the Interior, in his said decision of December 19, 1894, found as matter of fact that the defendant went upon the said tract on the 19th day of September, 1890; that he at once began a house, which he finished October 10th, 1890; that from this last-mentioned date to November 20th, 1890, defendant made the land his home with the exception of one absence, from October 19th to October 24, 1890; that from November 1, 1890, to the date of the hearing before the register and receiver, defendant was temporarily absent for days at a time at Grand Marais, Minnesota; that no facts had been produced, and that there was nothing to show, that these absences were not for good reasons, and that no evidence had been introduced which showed that the settlement of defendant was not made in good faith. Your orator further avers and shows that no other or further material facts were found by the Secretary in said decision touching the settlement, residence, and good faith of defendant, and that there is no finding of fact whatever therein that the defendant at any time ever cultivated any portion of said tract. Your orator further avers and shows unto your honors that upon the foregoing recited and none other material or different facts the Secretary, as matter of law, held and decided in said decision that defendant was a settler upon said tract in good faith, and had complied with the requirements of law. Your orator further avers and shows unto your honors that said application of law to the facts as found was erroneous; that it was contrary to, violative of, and against the law properly applicable to such facts; that upon such facts it should have been held and decided that defendant was not a settler in good faith, and had not complied with the law, and that upon the question of cultivation alone the said decision proceeded in error of and against law.

19. That up to the date of said hearing before the register and receiver in the months of June and July, 1892, and since said hearing, as your orator is informed and believes, and therefore avers the fact to be, the only settlement ever made upon said land by defendant was the erection of the house referred to in the said decision of the Secretary of December 19, 1894; that said house was a rudely constructed log shanty or hut, which could have been built by two men in a few hours, with holes in the roof through which a man could thrust his hand, and which was worth not more than from twenty-five to fifty dollars; that no other outhouses or buildings of any kind were constructed or erected on the land by defendant; that no other substantial or valuable improvement of any kind was made by defendant upon the land; that the defendant was absent from the land the greater part of the time covered by his alleged or claimed residence thereon; that, during all of the time he claimed residence on said tract, he had other living apartments, fully furnished for residence, in Grand Marais, fifty miles distant from the

land, and that the greater portion of said period was spent by defendant at Grand Marais in the occupancy of said last-mentioned apartment or place of abode.

20. That by reason of the premises your orator was entitled to and should have been awarded, by the said decision of the Secretary of the Interior, a right to a final homestead commutation cash entry for said premises; that a patent should have been issued to her for said tract, and that the denial to her of such her rights in the premises arose solely from misconstruction and error of law by the Secretary in the said decision of December 19, 1894.

16

21. That by virtue of the facts hereinbefore set forth your orator became, was, and is entitled to the said land and premises, and is the equitable owner thereof; that the patent which issued, as aforesaid, to said defendant vested the legal title to said land in said defendant subject to the rights and equities of your orator, and that the said defendant holds the same as trustee, in trust for the use and benefit of your orator.

22. Inasmuch, therefore, as the matters and things herein alleged are not cognizable in a court of law, and can only be heard and determined in a court of equity, your orator prays:

First. That the defendant, Richard Dowman, may be made a party to this bill of complaint.

Second. That process of subpœna in chancery may issue out of this honorable court to the said defendant Richard Dowman, requiring him within a day to be named therein to appear and answer to the exigencies of this bill of complaint, and true and full answer make thereto, answer under oath being hereby expressly waived.

Third. That, pending the final hearing of this cause, the defendant may be restrained and enjoined from disposing or attempting to dispose, by contract, agreement, conveyance or otherwise, of the said premises, or any part thereof, or of any interest therein, or in any part thereof, and from executing or attempting to execute any deed, mortgage, or other conveyance of the same, or of any part thereof, or of any interest in the same, or in any part thereof.

Fourth. That, upon final hearing hereof, the title to the said land and premises, to wit, the southeast quarter (S. E. ¼) of section twenty-two (22) in township sixty-five (65) north of range four (4) west, fourth (4th) principal meridian, in the State of Minnesota, may be ordered, adjudged, and decreed to be in your orator; that the legal title outstanding in said defendant may be ordered, adjudged, and decreed to be held by him as trustee for your said orator, for her use and benefit; that the defendant may be perpetually enjoined from in any manner interfering with your orator in the full and complete enjoyment of the same, or of any part thereof, and that said defendant may be ordered, adjudged and decreed to convey to your orator all the right, title, and interest acquired by him in or to said land and premises under the patent of the United States issued to him upon the seventeenth day of March, 1897.

17 Fifth. And for such other and further relief as justice and equity may require.

The defendant to this bill of complaint is Richard Dowman.

CARRIE MOSS.

DRAPER, DAVIS & HOLLISTER,
Solicitors for Complainant.
M. D. BRAINARD,
JAMES K. REDINGTON,
Counsel for Complainant.

DISTRICT OF COLUMBIA, } ss:
County of Washington, }

I, Carrie Moss, being first duly sworn, do depose and say that I am the complainant in the above-entitled cause; that I am a legal resident of the county of Cook, in the State of Minnesota, temporarily in the city of Washington, in the District of Columbia; that I have read the foregoing bill of complaint by me subscribed, and know the contents thereof; that all statements therein made of my own knowledge are true, and all made upon information and belief I believe to be true.

CARRIE MOSS.

Subscribed and sworn to before me this 20th day of March, 1897.

[SEAL.] JOHN R. YOUNG,
Clerk Supreme Court of the District of Columbia.

EXHIBIT A.

(4-007.)

Homestead.

Application No. 4753.

LAND OFFICE AT DULUTH, MINN., *May* 7, 1890.

I, Robert H. Doran, of Duluth, Minnesota, do hereby apply to enter, under section 2289, Revised Statutes of the United States, the S. E. ¼ of section 22, in township 65 N. of R. 4 W., 4th P. M., containing 160 acres.

ROBERT H. DORAN.

LAND OFFICE AT DULUTH, MINN., *May 7th*, 1890.

I, W. Colvill, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

W. COLVILL, *Register.*

18 EXHIBIT B.

(4–138.)

Receiver's duplicate receipt No. 4753.

Application No. 4753.

Homestead.

RECEIVER'S OFFICE, DULUTH, MINN., *May* 7, 1890.

Received of Robert H. Doran the sum of fourteen dollars — cents; being the amount of fee and compensation of register and receiver for the entry of S. E. ¼ of section 22, in township 65 N. of range 4 W., under section 2290, Revised Statutes of the United States.

$14.00. S. L. FRAZER, *Receiver.*

EXHIBIT C.

DULUTH, MINN., *Oct.* 24, '90.

I hereby assign and relinquish to the United States all my rights, title, and interest in and to the within-described land and entry and request that my said claim and entry be canceled.

ROBERT H. DORAN.

Acknowledged before me this 24th day of October, 1890.

S. L. FRAZER, *Receiver.*

EXHIBIT D.

(4–007.)

Homestead.

Application No. 4969.

LAND OFFICE AT DULUTH, MINN., *Oct.* 24, 1890.

I, Carrie Moss, of Lake county, Minn., do hereby apply to enter under section 2289, Revised Statutes of the United States, the S. E. (—) of section 22, in township 65 N. or range 4 W., containing 160 acres.

CARRIE MOSS.

LAND OFFICE AT DULUTH, MINN., *Oct.* 24, 1890.

I, W. Colvill, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under section 2289, Revised Statutes of the United States, and that there is no valid adverse right to the same.

W. COLVILL, *Register.*

19 EXHIBIT E.

(4–137.)

Receiver's receipt No. 4969. Application No. 4969.

Homestead.

RECEIVER'S OFFICE, DULUTH, MINN., *October* 24, 1890.

Received of Carrie Moss the sum of fourteen dollars — cents; being the amount of fee and compensation of register and receiver for the entry of S. E. ¼ of section 22, in township 65 N. of range 4 west, 4th P. M., under section 2290, Revised Statutes of the United States.

$14.00. S. L. FRAZER, *Receiver.*

EXHIBIT F.

(4–063.)

Homestead.

LAND OFFICE AT DULUTH, *October* 24, 1890.

I, Carrie Moss, of Lake Co., Minn., having filed my application, No. 4969, for an entry under section No. 2289, Revised Statutes of the United States, do solemnly swear that I am a native-born citizen of the United States, over twenty-one years of age; that said application No. 4969 is made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever; and that I have not heretofore had the benefit of the homestead laws.

CARRIE MOSS.

Sworn and subscribed this 24th day of October, 1890, before—

S. FRAZIER,
Receiver of Land Office.

EXHIBIT G.

(4–102*b*.)

To be used in all entries since August 30, 1890.

Affidavit.

LAND OFFICE AT DULUTH, MINN.,
(Date) *October* 24, 1890.

I, Carrie Moss, of Lake Co., Minn., applying to enter (or file for) a hd., do solemnly swear that since August 30, 1890, I have not entered under the land laws of the United States or filed upon a

quantity of land which, with the tracts now applied for,
20 would make more than 320 acres, except — for —, settled upon by me prior to August 30, 1890. Said settlement was commenced —, and my improvements consisted of —.

CARRIE MOSS.

Sworn to and subscribed before me this 24th day of October, 1890.

S. L. FRAZER, *Receiver.*

EXHIBIT H.

UNITED STATES LAND OFFICE,
DULUTH, MINN., *Oct.* 12, 1892.

RICHARD DOWMAN
vs.
CARRIE MOSS.

Findings.

The record shows that Robert H. Doran, who made homestead entry of the tract of land in this controversy on May 7, 1890, relinquished his claim thereto October 24, 1890, and that Carrie Moss filed homestead No. 4969 same day for same land.

On November 18, 1890, Richard Dowman presented homestead application for the land, alleging that he was a settler thereon at the time of Doran's relinquishment. He asked for a hearing, which was granted, and trial set for December 29, 1890, on which day Dowman appeared in person and by attorney, and Moss appeared by attorney only.

Attorney for Moss moved to dismiss the hearing upon legal grounds, which motion was overruled. Moss then withdrew from the trial of the case, but subsequently appealed from the decision of the register and receiver, rendered in favor of Dowman upon testimony introduced by him. On February 4, 1892, the Commissioner, upon application of Moss, set aside all these former proceedings and remanded the case for a new trial, which began before this office June 15, 1892, continuing to and closing July 20, 1892.

At this second trial both parties were present in person and by their attorneys, and the testimony introduced was voluminous.

On September 24, 1892, Dowman filed motion to reopen the case, which motion was denied for obvious reasons.

The main questions to be determined by this hearing are:

Was Dowman upon the land in question, in the act of residing
21 thereon, at the time Moss made entry? And if he was, has his compliance with law since then been such as to entitle him to the land in face of the entry and compliance with the law by Moss?

We have carefully examined and considered the testimony, and find that Moss filed the relinquishment of Doran and her own ap-

plication to enter simultaneously in the forenoon of October 24, 1890, between ten and eleven thirty o'clock; that although Dowman claimed in his first trial that he was upon the land all day of October 24, 1890, he now, at this hearing, seeks to prove only that he arrived there October 24th, before noon.

Even if this were true, the burden is upon him to sho that he arrived there and became domiciled on that day, before M s filed. This he failed to prove conclusively, which failure alone would be fatal to his case.

But, in attempting to prove this arrival there on the 24th of October, he laid down a rule which, carefully followed out, proves, we think, beyond a reasonable doubt, that he was not upon the land at all on that day, and that he did not arrive there until about midday of October 25th, the day following.

Durfee, a witness for the defense, and whose general demeanor upon the stand forces belief in his statements, keeps a diary of events, and from that diary he testified that one of the parties (Smith Searles), whom Dowman claims accompanied him to a point near the land, left Duluth October 20th on the steamer Dixon, and that he and the balance of his party left Grand Marais for the north October 22d, after laying over one day in the village. The officers of the Booth Packing Company, owners of the steamer, corroborate this so far as the day of the departure of the boat is concerned. Taking this as the true time of starting, and following the daily progress of the party, we find that they and Dowman arrived in the vicinity of the land on October 25th, about the hour of twelve o'clock noon.

We also find from the testimony much doubt as to whether Dowman had a house built upon the land October 24th.

He swears that he moved into the house prior to that time, but his testimony in this respect is not properly corroborated, and the testimony of defendant's witnesses Drouillard, Prof. Winchell and Middaugh, casts so much doubt over it that we do not think Dowman has succeeded in making it sufficiently clear to entitle him to judgment even were it the governing fact in the case; and so we find against him on that point.

As to Dowman's compliance with the law, we find that his acts as a settler do not properly interpret the spirit of the home-
22 stead act; that while his acts of settlement up to January of the present year were such that technically, in absence of any other regular abiding place, and in absence of an adverse claim, would entitle him to favorable consideration, such cannot be accorded him under the full light of this investigation, for the reason that the greater part of his effects, such as trunks, wearing apparel, and other room furniture, still remain in Grand Marais, at the same place where they were before his endeavor to take this land.

So we find on this point that Dowman's place of actual residence was where his effects and most of his occupation was, to wit, Grand Marais, Minn.

On the contrary of this, Miss Moss removed all of her wearing apparel, books, furniture, bedding, etc., to the extent of more than

$1,000 to her house upon the land, the latter actually costing over $700 and has made a *bona fide* continuous residence thereon up to the date of this trial.

To recapitulate, we find that Dowman has failed to make out a case; that as a matter of fact he was not residing upon the land when Moss filed, and that he has not made such a compliance with law as would in any event undo the rights gained by Moss as an actual *bona fide* settler upon the premises.

This leads to the conclusion that the entry of Moss must stand, and that the application of Dowman must be dismissed, and it is so held, subject to the right of appeal if filed within thirty days from notice of this decision.

MONROE NICHOLS, *Register.*

EXHIBIT I.

UNITED STATES LAND OFFICE,
DULUTH, MINN., *October* 20, 1892.

RICHARD DOWMAN
v.
CARRIE MOSS.

Involving the S. E. ¼ of sec. 22, tp. 65 N., R. 4 W., 4th P. M.

Findings.

Miss Carrie Moss claims the land under consideration by virtue of her homestead entry, made October 24, 1890; this entry was allowed after an explanation in regard to the case of Dowman *v.* Thayer, then pending before the honorable Secretary, had been made.

Richard Dowman claims the land under and by virtue of his settlement thereon, alleged September 19, 1890, followed by his application on November 18, 1890.

23 On November 6, 1889, Dowman made application to contest the homestead entry of N. B. Thayer, then existing, for said land. This application was undetermined until November 14, 1891; in the meantime a number of entries were allowed on the land, each holding it for less than six months; it seems but natural that Dowman should attempt to acquire title by settlement; it certainly shows his good faith, which to me appears to be fully sustained by the testimony.

The evidence in the case is voluminous and exhaustive, and shows great care in its production.

A careful consideration of it justifies me in finding that Dowman settled upon said land as alleged, on September 19, 1890, and has ever since maintained a *bona fide* residence thereon, and in actual occupation and possession thereof on October 24, 1890.

I therefore recommend that the Moss entry be canceled and that Dowman be allowed to perfect his entry.

S. L. FRAZER, *Receiver.*

EXHIBIT K.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 9, 1893.

"H," Doc. 5, Case 7156.

RICHARD DOWMAN
v.
CARRIE MOSS.

H. E. No. 4969, S. E. ¼, sec. 22, tp. 65 N., R. 4 W.

Register and receiver, Duluth, Minn.

GENTLEMEN: Hearing in the above-entitled cause was ordered by office letter "H" of February 3, 1892. Both parties appeared before your office and trial was had June 15 to July 20, 1892. You disagreed in your opinions, that of the receiver being in favor of plaintiff Dowman, and that of the register in favor of defendant Moss.

Both parties effected appeals, alleging, in substance and effect that the decision against them was contrary to the law and the evidence.

From an examination of the record I find that Moss made her entry October 24, 1890; with her said application to enter was filed the relinquishment of one Doran, who had had a prior entry thereon. Dowman applied to entry November 18, 1890, alleging settlement September 19, 1890. Said application was re-
24 jected for the reason that the land was embraced in the entry of said Moss. Said Dowman therefore filed an affidavit of contest against said entry by Moss, alleging that he was a settler upon the said land in good faith when Doran's entry was relinquished and the entry of Moss allowed.

Moss was cited to appear and show cause why her entry should not be canceled. A hearing was had and cancellation of Moss' entry recommended thereon. Said action was sustained by this office. It was, however, afterwards held by this office, by letter "H" of February 3, 1892, aforesaid, that all proceedings heretofore had were irregular and a hearing ordered. The case is therefore now here on appeal from said rehearing.

Dowman left Grand Marais, where he had been living for several years, and went upon the land, which was then covered by Doran's entry, September 19, 1890. He at once commenced the construction of a log house or cabin, which was completed October 10th following. He placed therein a cooking stove and some crude furniture, such as bunks or beds, stools, a table and some shelves. These were all hewn out of the timber found on the place. He remained in this cabin continuously until October 30, 1890. His only absence was from about October 19th to 24th, when he made a trip to secure provisions. He was on the land two or three days imme-

diately following December 1, 1890. He again left and did not return until about January 20, 1891, when he stayed about ten days. He is not very certain as to number of days he was upon the place the last-mentioned trip. He was present on the land a few days in the first part of February and a few days the latter part. In March, from 1st to 5th. He again went to the land April 10th, and remained almost continuously until the 6th of the following June, when he again left for Grand Marais, and thereafter made occasional visits to the land.

Dowman's cabin was of hewn logs about six feet high, with one door, one window, and shake roof. Its value is probably about thirty-five dollars. He caused to be cleared a tract from three to four acres in extent. This clearing was made on a rocky piece of ground from which most of the timber had been burned.

Miss Moss made her entry as aforesaid October 24, 1890. April 22, 1891, she reached the land with her employees, Mr. and Mrs. White and Mr. Bisbee. They took with them to the land a large quantity of household and other effects necessary to a settler in a new country. Three teams were employed by Miss Moss to convey her party and goods to this land from Port Arthur, at an outlay of $80 per team. She at once commenced the construction of a comfortable and commodious house and storehouse. About four acres have been cleared. The house constructed by Moss is a most excellent habitation according to all the testimony introduced. It was built at an expense of at least five hundred dollars. Miss Moss has resided on said land since her said settlement, except for a period of about two months, when she was absent on business connected with the land involved herein. Her residence has been actual, and her improvements substantial. There can be no question that she has exercised the utmost good faith. I do not think Dowman has been a settler in good faith. His home had been at Grand Marais for some years. It does not satisfactorily appear that he ever changed his residence to the land in dispute. Grand Marais seems to have been his headquarters during the time investigated at this trial. From there he made occasional trips to the land, with the evident intention of returning to said Grand Marais.

A careful consideration of the great mass of testimony adduced at the trial before your office impels me to believe that Dowman only made a pretentious or colorable residence on the land for the purpose of "holding it down."

I therefore concur in the opinion of the hon. register, and dismiss the contest of Dowman, subject to appeal.

Notify the parties.

Very respectfully,

M. M. ROSE,
Ass't Commissioner.

EXHIBIT L.

Before the Honorable Secretary of the Interior.

Appeal.

RICHARD DOWMAN
vs.
CARRIE MOSS.

Involving H. E. No. 4969, for S. E. ¼ of sec. 22, tp. 65 N., R. 4 W., Duluth, Minn.

Now comes the said Richard Dowman, by his attorney, and appeals from the action of the Hon. Commissioner of the General Land Office in the above-entitled cause of February 3, 1891, ordering a rehearing, and from his decision therein of January 9, 1893, alleging error therein as follows, to wit:

1st. In reviewing and revoking his decision of May 6, 1891, and allowing a motion for a new trial, said motion having been
26 made without notice to appellant or his counsel.

2d. In taking action in said case, upon request of counsel for Moss, without notice to appellant or his counsel, in disregard of rule 73 of practice.

3d. In holding that Dowman was not an actual *bona fide* settler and resident upon the land prior to, on, and after October 24, 1890.

4th. In holding that Dowman's residence was at any time subsequent to his settlement at Grand Marais, or at any other place than the land in contest.

5th. In holding that Dowman only made a pretended or colorable residence on the land for the purpose of holding it down or for any other purpose.

6th. In not finding that all of Dowman's acts in the premises show persistent efforts made in good faith to secure the land as a home.

7th. In not finding that the claim of Miss Moss was intended to be initiated with full knowledge of the claim of Dowman.

8th. In not holding that the entry of Moss was improperly allowed during the pendency of proceedings by Dowman against the validity of prior entry covering said land.

9th. In holding that the entry of Moss was made in good faith for her own use and benefit.

10th. In holding that Moss has complied in good faith with the requirements of the homestead law.

11th. In holding that Moss established residence upon the land in good faith within six months after entry, or at any time.

12th. In holding that she has resided continuously upon the land since April, 1891, in good faith or otherwise.

13th. In not holding that Dowman has the prior and better right to the land, and in not allowing his application to enter.

14th. In its findings of fact and in its conclusions of law.
Respectfully submitted.

P. H. SEYMOUR,
Attorney for Dowman.

Washington, D. C., February —, 1893.

27 EXHIBIT "M."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December* 19, 1894.

Conflict between Settler and Entryman.

RICHARD DOWMAN
vs.
CARRIE MOSS.

The Commissioner of the General Land Office.

SIR: The full record of the cause shows the following:

On February 6, 1885, Henry B. Greening made homestead entry of the S. E. ¼ sec. 22, tp. 65 N., R. 4 W., Duluth (Minnesota), land district. On May 11, 1888, Greening relinquished his claim, and Lyman E. Thayer, of Wausau, Wisconsin, made homestead entry. On November 10, 1888, one day less than six (*m*)ths) after Thayer relinquished, and Julia McCarthy made homestead entry. On May 9, 1889, one day less than six months after McCarthy relinquished, and Napoleon B. Thayer made homestead entry.

On November 9, 1889, exactly six months after, Thayer relinquished and John A. Murphy made homestead entry. On May 7, 1890, two days less than six months after, Murphy relinquished, and one Robert H. Doran made homestead entry. Doran, before making this last entry, had an entry of record, made August 4, 1886. He filed a relinquishment of this, with an affidavit stating that he had received no benefit from his entry made August 4, 1886. He therefore claimed the right to make a new entry, and with the filing of the relinquishment of Murphy he made application to enter that land, which is the land in controversy. This application was allowed.

On October 24, 1890, Carrie Moss, defendant in the case under consideration, filed Doran's relinquishment and an application to make homestead entry of the land, which was allowed.

On November 18, 1890, Richard Dowman, plaintiff, applied to make homestead entry of the land. With his application Dowman filed an affidavit stating that he made actual settlement on the land September 19, 1890, (buil*d*) a house, was residing thereon, and was in full and exclusive possession on October 24, 1890, when Doran's entry was relinquished and Carrie Moss made her entry.

Steps were taken to determine the rights of these parties forthwith, but being afterwards set aside because of an undecided
28 contest then pending, which involved the land in controversy, they need not be detailed.

On February 3, 1892, however, your office ordered a hearing to determine the rights of Dowman and Moss to the said land.

Under this a hearing was ordered and held July 20, 1892, after which two opinions were rendered, one by each of the local officers.

The register held, "that Dowman had failed to make out a case; that as a matter of fact he was not residing upon the land when Moss filed, and that he had not made such a compliance with the law as would, in any event, *under* the rights gained by Moss as an actual *bona fide* settler upon the premises. This leads to the conclusion that the entry of Moss must stand, and that the application of Dowman must be dismissed, and it is so held subject to the right of appeal."

The receiver held that, "a careful consideration of it (the evidence) justifies me in finding that Dowman settled upon said land as alleged, on September 19, 1890, and has ever since maintained a *bona fide* residence thereon, and was in actual occupation and possession thereof on October 24, 1890. I therefore recommend that the Moss entry be canceled and that Dowman be allowed to perfect his entry."

Both parties appealed, and your office, by letter ("H") of January 9, 1893, found that:

"Dowman left Grand Marais where he had been living for several years, and went upon the land, which was then covered by Doran's entry, September 19, 1890. He at once commenced the construction of a log house or cabin which was completed October 10, following.

"He placed therein a cooking stove and some crude furniture, such as bunks or beds, stools, a table and some shelves. These were all hewn out of the timber found on the place.

"He remained at this cabin continuously until October 30, 1890. His only absence was from about October 19 to 24, when he made a trip to secure provisions.

"A careful consideration of the great mass of testimony adduced at the trial before your office impels me to believe that Dowman only made a pretentious or colorable residence on the land for the purpose of 'holding it down.'

"I therefore concur in the opinion of the honourable register, and dismiss the contest of Dowman, subject to appeal."

29 From this decision Dowman has appealed to this department.

There appears an error in the record of this case, to point out which is not material to a determination of the only question at issue, yet it is deemed important that the attention of the local office be directed to it.

This was permitting Doran to relinquish his homestead entry and make entry of the land in controversy.

The second section of the act of March 2, 1889 (25 Stats., 854), under the provisions of which Doran claimed the right to make another entry, provides: "That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law may make a homestead entry of not exceeding

one quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding."

The intent of this provision was to afford relief to those entrymen who for some reason had lost their land, and under the law were precluded from making a second entry. It was not intended to allow those who made entry before the approval of the act, to relinquish it and make a new entry. To construe the act as allowing this would be to open a way for the sale of homestead claims and the taking of new ones, which is against the policy of the public land system.

Doran made an entry on August 4, 1886, and that entry severed the land covered by it from the public domain, and kept it under the control of Doran until he relinquished it, on May 7, 1890, a period of nearly four years. The latter date was more than a year after the approval of the act under which he claimed the right to make another entry.

Therefore, the entry of Doran was erroneously allowed.

The only question to determine in this case is, whether Dowman was a settler in good faith at the time Doran's relinquishment was placed on file in the local office. For although Doran's entry was erroneously allowed, being of record it segregated the land, and therefore no right could be initiated by reason of settlement.

But the instant the relinquishment was filed in the local office the right of the settler on the land attached and an entry could not defeat it. In this case it not being denied that Dowman settled upon the land, the only question is whether he did so in good faith—that is, with the intention of taking the same under the homestead law.

The testimony introduced by the defendant is nearly all irrelevant. Instead of impeaching the good faith of the settler Dowman, defendant introduces evidence to show the character of the defendant's improvements, the amount of money she could afford to expend on them, and how much superior they were to those of the settler. Defendant also introduces a great amount of testimony to try to show that although settler Dowman settled September 19, 1890, built a cabin, and went to live on it, that in returning from a trip to the county town to buy provisions he did not get to the land on his return until a short time after the minute when, it is claimed, Doran's relinquishment was filed and Moss's entry made at Duluth, one hundred and sixty miles away.

It is probably established doctrine in this department that has been upheld by a long line of decisions that are too numerous to cite, that necessary absences from a man's claim do not break the continuity of settlement or residence within the intention of the land laws, but that the settler, though actually absent, is constructively present upon this land to all intents and purposes. Therefore, even had Dowman not been actually within the limits of his claim at the instant the relinquishment of Doran was filed in the land office at Duluth, he was constructively upon the land, as that was his only home and his right attached before that of Moss's entry, just as surely as if he had been actually within the walls of

his cabin. To hold otherwise would be both unreasonable and trifling; and therefore would not be sanctioned by law. But the evidence does not show, first, the exact time when the relinquishment of Doran was filed. Miss Moss, in her testimony, admits that she did not know the exact time when it was filed, and there seems to be considerable doubt on this point.

Second. The evidence does not show that Dowman was not within the limits of his claim at the time it is presumed that the relinquishment was filed.

But from what has been said it is needless to further discuss testimony bearing upon this point, as this kind of testimony, like that relating to Moss's improvements, and the large amount of money she possessed and expended is wholly irrelevant to the only question at issue, as are also the acts of Dowman since his right attached on October 24, 1890, to which the defendant also devotes a great deal of evidence.

A careful examination of all the evidence in this case has been made, the testimony alone compromising nearly seven hundred pages of typewritten matter. This shows the facts in the case to be substantially as follows:

The land involved in this controversy lies in the first school district of Cook county, State of Minnesota. This county is
31 a very large one, being fifty miles long, east and west, and eighteen miles wide, north and south, at the east end, and fifty miles wide north and south at the west end. The northern line of the county is the southern line of Canada.

The land in controversy lies in the northern central part of Cook county, near the Canadian line. To use a description made by Miss Moss, the defendant, "the land was situated in the wildest and most unbroken wilderness, without roads, or even foot trails through Minnesota for the settlements, distant by rail from Duluth over nine hundred miles. The nearest post-office is fifty miles away, and telegraph nearly one hundred miles distant."

Richard Dowman, the settler and contestant in the case, had lived for a number of years in Grand Marais, the county town of Cook county, distant fifty miles southeast of the land, and in the same school district.

He was a member of the first district school board, a county commissioner, was unmarried, and his occupation, besides the two county offices, appears to have been that of an explorer and guide for parties going through that part of the country. The evidence does not show that he had any other visible means of support or possessed much money.

Although numerous persons have made homestead entry of this land, none appear to have done so in good faith, for none appear to have made any settlement during the period of five years it was entered and relinquished every six months. Dowman, according to his own testimony, knowing the land had been thus entered and relinquished a number of times without any of the entrymen attempting to make settlement thereon, went on the land September 19, 1890, and began the construction of a house, which he finished

October 10, following. From that time he made the land his home, actually living there continuously until November, 1890, with the one exception of a trip to the county town for provisions, which he made October 19, 1890, returning October 24, 1890, the day Doran's relinquishment was filed.

From November 1, 1890, to the date of the hearing, he has been temporarily absent for days at a time in Grand Marais, the county town of Cook county, a village of one hundred and twenty inhabitants, but which, although fifty miles distant, lies in the same school district as does the land in controversy.

This absenteeism appears owing largely to the fact that Dowman was a member of the school board and a county commissioner,
32 two distinct offices, and to fulfill the duties of which he was compelled to go to the county town. The county town was also the nearest point at which provisions could be obtained. Owing to the distance, the absence of transportation and the difficulties of the route, it required two days to make the trip, and Dowman appears to have on occasions been absent quite a number of days at a time from his claim. But this does not necessarily show bad faith, and the department always presumes temporary absences to be for good reasons, and before a contrary reason will be accepted, facts must be disclosed which prove it.

In this case no such facts have been produced, and nothing to show Dowman had any other home than that on the land in controversy, beyond a room, over the store of a friend, which he occupied in the county town on these visits.

Moss was a school teacher in Grand Rapids, Michigan, and had taught school in cities for a period of twenty years. She was unmarried, about forty years of age, and had $4,000 in cash and a farm in Dakota yielding an income of from $100 to $250 per annum, while her salary was $60 per month. She bought the relinquishment of the land solely on the representations of her Dakota agent, from Doran, who, as previously shown, had been erroneously allowed to make entry of the land.

Without knowing anything of the land except from her agent, and without ever having been nearer than one hundred and sixty miles on an air line and nine hundred miles by rail, she paid $1,000 for the relinquishment.

The evidence shows that at that time Dowman was a settler living upon the land.

Returning to Grand Rapids, Michigan, over one thousand miles from the land by the nearest route, although she had sworn she made entry on the land with the purpose of making settlement thereon, Moss continued to teach school until the latter part of March, five months after her entry, and after she had been served with a notice of Dowman's contest.

The following month she made the trip to the land, arriving there two days before the expiration of the first six months after her entry. Pitching a tent within sight of Dowman's house, in which he was living, she began the erection of improvements so near to Dowman's cabin that the clearings joined, erecting a residence that cost

$700, and all the furniture and conveniences that money could buy to make it comfortable for a woman to reside in. All this expenditure and improvement were made in the face and with a knowledge of Dowman's claim and prior settlement, and therefore made
33 at Moss's own risk, and it would appear, for the purpose of defeating his claim, if possible, by means of superior improvements, in spite of the long-established and well-known ruling of this department in such cases.

The character or value of Moss's improvements gives her no advantage. Because she had more money than Dowman to expend on improvements does not detract from his rights.

In view of these facts and that no evidence has been introduced which shows that Dowman's settlement was not made in good faith, under the established ruling of this department, the settler Dowman's right attached instantly on the filing of Doran's relinquishment, and is therefore superior to Moss's entry.

Your office decision is therefore reversed, and you will cancel Moss's entry, and allow that of Dowman.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

EXHIBIT N.

Before the Honorable Secretary of the Interior.

Involving homestead entry No. 4969, Duluth, Minnesota.

Motion for Review.

RICHARD DOWMAN
vs.
CARRIE MOSS.

Now comes Carrie Moss, by her attorneys, Brainard & Le Barnes, and moves review and reconsideration of departmental decision of December 19, 1894, in the above-entitled case, on ground of errors of law and gross errors in findings of fact, to wit:

I.

Errors of Law.

1. Error in defining "good faith" as a bare "intention to take up land under the homestead law" without reference to compliance or intended compliance with the requirements of the law.

2. Error in casting the burden of proof on defendant to "show that Dowman was not within the limits of his claim at the time it is presumed that the relinquishment (of Doran) was filed;"
34 because Dowman is the contestant, alleging actual settlement and residence at the date of that cancellation, in order to defeat an entry of record, to wit, the entry of Miss Moss, and the burden of proof was upon him to affirmatively establish the truth of his allegation.

3. Error in holding it immaterial whether Dowman was or was not actually present and personally residing on the land at the time of the cancellation of Doran's entry, because he could obtain no right to the land segregated by that entry until the moment of time of such cancellation, and he must, at that moment, have had an actual and *bona fide* settlement and residence on this land before any right could attach to it to the defeat of the entry of Miss Moss made simultaneously with the filing of Doran's relinquishment; and if, as will be pointed out in the assignment of errors in findings of fact, Dowman had no settlement or residence on this land prior to October 24, 1890, it becomes the material point at issue in the case whether he was actually upon the land on said October 24, 1890, and, if so, whether he was (*so*) there on or before the hour of 11.30 a. m., on that date.

4. Error in apparently deciding this case on the practically unsupported and effectually contradicted testimony of one of the parties thereto, without giving due weight or just consideration to the evidence of the opposing party.

II.

Cross errors in Findings of Fact.

1. Error in stating that "it is not denied that Dowman settled upon the land;" because, as a matter of fact, it is denied emphatically, throughout the testimony for defendant, that Dowman settled on this land on September 19, 1890, or at any time thereafter up to and including October 24, 1890, and because it is denied, emphatically, throughout the testimony for defendant, that Dowman ever at any time up to the hearing made a *bona fide* settlement on said land, or at any time made otherwise than a colorable pretext of settlement thereon.

2. Error in stating that defendant did not "impeach the good faith of Dowman," whereas, the burden of the testimony introduced by defendant was a direct impeachment of Dowman's good faith at every step, and a direct and successful impeachment of the truth of his testimony in every material particular.

3. Error in stating that defendant "introduced a great amount of testimony to try to show that although a settler, Dowman settled September 19, 1890, built a cabin and went to live in it, that in returning from a trip to the county town to buy provisions, he did not get to the land on his return until a short time after the minute when it is claimed Doran's relinquishment was filed and Moss's entry made at Duluth, one hundred and sixty miles away;" the error in the foregoing statement being that the same is an entire misapprehension of the tenor of the testimony and of the points to which the testimony was directed, those points being that if Dowman had settled September 19th, as alleged, and "built a house and lived in it," and if he returned to the land on October 24, 1890, as alleged, after an absence, still he did not reach the land until a material length of time after the cancellation of Doran's

entry. But the testimony was directly aimed to establishing the facts, and does completely establish the facts, 1st. That Dowman did not "settle on the land on September 19, 1890." 2nd. That he did not at that time, nor at any time until after Oct. 24, "build a house and go to live in it." 3rd. That he did not not reach the land, when he did go there to commence his pretended settlement, until October 25, 1890, and 4th. That he never "lived" in said house, at or about the period mentioned—nor at any other time prior to the hearing.

4. Error in the statement that "Miss Moss in her testimony admits that she did not know the exact time when Doran's relinquishment was filed," and that "there seems to be considerable doubt on this point;" the error in this statement lying in the implication of doubt as to any material point of time in which said relinquishment was filed, there being no doubt from the testimony, and no room for doubt, that the relinquishment was filed, Doran's entry cancelled, and the entry of Miss Moss allowed some time before 11.30 a. m. Oct. 24, 1890, because, after these things had been done, and after Miss Moss and Mr. Bisbee had returned from the land office in Duluth to their hotel, it was then found to be 11.30 a. m.

5. Error in finding that Dowman "made the land his home, actually living there continuously," from October 10, 1890, to Nov. 1, 1890, "with the one exception of a trip to the county town for provisions." The error in this finding lies in accepting, as truth, Dowman's impeached and overthrown testimony, and in ignoring all the evidence (disapproving) that testimony, which evidence, as shown by the record, is complete and everwhelming.

6. Error in finding that Dowman's absences from the land were only temporary, and that he had no other residence than on this land, while, in fact, the preponderating evidence is clear that his visits to this land were temporary and *pro*functory, only, and that his actual residence was all the time maintained at Grand Marais.

36 7. Error in finding that Dowman "went on the land September 19, 1890, and began the erection of a house which was finished Oct. 10, following," when he "went to live in it." This finding is drawn exclusively from Dowman's own statement, without substantial corroboration, his only witness to prove the date of "commencing and completing the house" and of his "going to live in it," being the Indian Caribou, who admitted, on cross-examination, that he knew nothing about the dates, and that he testified to dates that he was told by Morrison, one of Dowman's men; and Morrison was not there and is not pretended to have been there. On the other hand, four competent, reliable and wholly disinterested witnesses, who visited the land at different times in October, 1890, swear to facts that completely disprove Dowman's testimony. W. S. Van Zant, an explorer, was on this land Oct. 15, 1890, and found no house there at that time. John Druillard, an explorer for the Pittsfield Iron Co., was on this land, together with the president of the company, in October, 1890 (about Oct. 25, as afterwards shown).

They were on the very spot where Dowman's cabin was afterwards built, and they camped about there two or three days. Druillard swears that there was no house there at that time. Dowman was not there.

Prof. Horace V. Winchell, a geologist of reputation and high standing, and Mr. W. I. Middaugh, his assistant, visited the land Nov. 1, 1890, having gone there to examine the land. They found a small cabin that had evidently just been built. Prof. Winchell says he went into the house and staid there about half an hour. It was very cold. There was no stove nor fireplace and no fire outside. There were two or three three-legged stools in the cabin, a bunk with some boughs upon it, and a small pine table. The cabin looked as if it had been put up within a few days. Mr. Middaugh says that the cabin was unfinished, and that the floor had not been cleared off. The moss and chips made in building it were still on the floor. The house was not habitable. The only furniture consisted of a couple of three-legged stools, a table, and a few cooking utensils. There was no one living in the house, and no one there, and no provisions there of any kind.

This testimony is irrefutable and material. It goes to Dowman's good faith and impeaches his truth and veracity, and shows that he and his prompted Indian witnesses testified falsely. It shows that the cabin was not built until the very last part of October 10, 1890, instead of having been "completed October 10, 1890," as sworn to by Dowman, and instead of having "lived in it from Oct. 10 to Nov. 1, 1890," it could not have been lived in (because not built) prior to Nov. 1, and was not occupied on that date, and was not then
37 furnished with the necessary appliances of a stove and other things, essential to inhabitancy, which Dowman swears he had placed in the cabin three weeks previously. The truth, deducible from the whole testimony is that Dowman made no settlement, and no pretext of settlement on this land until October 25, 1890, (instead of September 19, as alleged) and that his house was not built until between October 25 and Nov. 1, 1890, and the error in disregarding the evidence of defendant on these points is fatal to a correct and just decision.

8. Error in finding that "the evidence does not show that Dowman was not within the limits of his claim at the time it is presumed the relinquishment was filed." The error in this finding consists in ignoring the whole of the evidence of the defendant on the point at issue, and in ignoring the fact that this evidence was corroborated by material witnesses for plaintiff. It appears from testimony on both sides that a party consisting of Smith, Searls, Probeck, Howenstine, Caribou, and others left Grand Marais at about the same time, and subsequently met Dowman some miles distant from the land in controversy. This testimony and the testimony of W. S. Van Zant, who had seen Dowman around Gun Flint lake about the middle of October, 1890, proved that Dowman was not on this land at either time. Searls, for Dowman, testified that his party left Grand Marais on Oct. 21, 22 and 23, he did not remember the exact date. But his testimony, and the testimony of

others of the party, also witnesses for Dowman, showed that on the second night out Dowman came into their camp at Hungry Jack lake, and camped with them that night; that the next day he left them to visit his pre-emption claim, (in a different section from this land) and returned, and met them at the east end of Gun Flint lake, where they all camped together that night, and that on the following day they crossed the lake, and, after dinner, they, with Dowman, went up the trail about two miles, where the parties separated, Dowman turning off to the right, toward the land in contest, and the other party going further west.

Howenstine, for Dowman, testifies that it was not until after dinner that they separated from Dowman; and that it was not until some time in the afternoon that this separation took place is shown by the facts stated by Howenstine, and they traveled together about two miles, after dinner, and that his party then, going over about the same kind of a trail as Dowman had to go to reach this land, did not arrive at their next camping place, about four miles further on, until night. Dowman had some distance to go, after leaving this party, to get to the land in contest, and the physical impossibility of his reaching it before noon is apparent. He did not
38 separate from the Searls and Howenstine party until some time in the afternoon, and he had then to walk some distance to get to this land. The evidence further shows that this was on the 25th day of October, 1890, and not on the 24th day of October, as alleged by Dowman.

The testimony of Chester S. Durfee, a reliable witness, whose knowledge of dates was supported by a diary of events, and who is corroborated by the cashier of the company owning the steamer H. R. Dixon, (who testified from the records of the boat), shows that he was on the boat with Searls and his wife on the trip of the latter from Duluth to Grand Marais, and that the boat left Duluth on the morning of Monday, Oct. 20, 1890, and arrived in Grand Marais in the evening of that day. He also testifies that Searls spent the next day, Oct. 21, in Grand Marais, fitting out his party, and that this party left Grand Marais on the morning of Oct. 22. It was the second night out, according to Searls and Howenstine, that is to say, the night of Oct. 23, 1890, that this party camped with Dowman at Hungry Jack lake, and the third night out, that is to say, the night of Oct. 24, 1890, that they camped with Dowman at the east end of Gun Flint lake. The next morning, that is to say, the morning of Oct. 25, 1890, they crossed the lake, and, after dinner, they traveled up the trail about two miles, when they left Dowman, he stating that he was going to this land. This was some time in the afternoon, evidently about the middle of the afternoon, of October 25, 1890.

The error of the decision in stating "that the evidence does not show that Dowman was not within the limits of his claim" at the time *of* the relinquishment was filed—which was previous to 11.30 a. m., on October 24, 1890—is apparent, gross, and material. 1st, because it is shown by the testimony on both sides, absolutely and conclusively shown, that he was not within those limits at or near

11.30 a. m., and that it was a physical impossibility for him to have been there at that time. 2nd, because the preponderance (*od*) evidence shows that he was not, and physically could not have been there until some hours after that time, and 3d, because the only certain and reliable testimony on the points of dates fixes the date of his arrival on the land as October 25, 1890.

For all the foregoing reasons we pray the review and reconsideration asked for.

Respectfully submitted.

BRAINARD & LE BARNES,
Attorneys for Miss Moss.

39 J. W. Le Barnes, being sworn, deposes and says that the foregoing motion is made in good faith and not for the purpose of delay.

J. W. LE BARNES.

Sworn and subscribed before me this 16th day of January, 1895.

H. B. ZEVELY,
Notary Public.

EXHIBIT O.

E. F. P. F. L. C. A. E. V. B.

J. I. H. Vol. 18—976. 475—1895.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *February* 23, 1895.

RICHARD DOWMAN
v.
CARRIE MOSS.

The Commissioner of the General Land Office.

SIR: Your office letter of January 17, 1895, transmits an application by Carrie Moss, defendant in the above entitled cause, to be allowed to file an argument to sustain a motion for review of departmental decision dated December 19, 1894.

The land involved is the S. E. ¼ of sec. 22, T. 65, N., R. 4 W., Duluth, Minn.

This application sets out alleged errors of law and alleged errors in findings of fact.

This case, when before the department, was given the most careful examination, and the application under consideration does not show any question which was not fully and exhaustively examined. The application is therefore denied.

Very respectfully, HOKE SMITH, *Secretary.*

EXHIBIT P.

Vol. 18—976. A. E. V. B.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *August* 28, 1896.

RICHARD DOWMAN
v.
CARRIE MOSS.

The Commissioner of the General Land Office.

SIR: On February 23, 1895, the department denied a motion by Carrie Moss to file argument to sustain a motion for review in the above-entitled cause (see 20 L. D., 122). The land involved is the S. E. ¼ sec. 22, tp. 65, N., R. 4 W., Duluth, Minnesota.

On March 26, 1895, the Secretary, on motion of Moss, recalled the decision of February 23, 1895, and granted a motion to file briefs and make oral argument.

After exhaustive argument by counsel, the case has been fully considered, and I feel constrained to follow the long line of decisions of the department on the questions involved, and therefore the decision rendered December 19, 1894, will be adhered to.

The papers are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

EXHIBIT Q.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *September* 16, 1896.

J. L. M. Doc. 5, Case 7156.

Involving right to S. E. ¼ sec. 22, T. 65, R. 4, covered by H. E. No. 4969.

RICHARD DOWMAN
v.
CARRIE MOSS.

Register and receiver, Duluth, Minn.

GENTLEMEN: In the above-entitled cause I enclose herewith a copy of the decisions of the Hon. Secretary of the Interior, dated February 23, 1895, and August 28, 1896, denying the motion for review of departmental decision of December 19, 1894, which was adverse to Moss.

Said case is accordingly hereby closed. Notify the parties in interest. Notify Dowman hereof and that he will be allowed thirty days within which to perfect his application, herewith returned,

and in event he so does you will cancel the entry of Moss and advise this office thereof.

Very respectfully,

E. F. BEST,
Assistant Commissioner.

Indorsed: Filed March 23rd, 1897. Henry D. Lang, clerk, by L. Davies, deputy.

That on the same day, to wit, on the 23rd day of March,
41 A. D. 1897, there was filed with the clerk of said court, a præcipe for chancery subpœna in said cause, which said præcipe is in words and figures as follows, to wit:

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

CARRIE MOSS, Complainant,
vs.
RICHARD DOWMAN, Defendant. } No. —. In Equity.

The clerk will please issue chancery subpœna for the defendant, on filing the bill of complaint herewith submitted.

Respectfully,

DRAPER, DAVIS & HOLLISTER,
Solicitors for Complainant.

Indorsed: Filed March 23rd, 1897. Henry D. Lang, clerk, by L. Davies, deputy.

That on the same day, to wit, on the 23rd day of March, A. D. 1897, there was issued, in pursuance to the foregoing præcipe, a chancery subpœna in said cause, which said chancery subpœna is, in words and figures, as follows, to wit:

(Original.)

UNITED STATES OF AMERICA,
District of Minnesota, Fifth Division.

The President of the United States of America to Richard Dowman, Greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States, for the district of Minnesota, on the first Monday of May next, at the city of Duluth, then and there to answer the bill of complaint of Carrie Moss, citizen of the State of Minnesota, filed against you on the 23rd day of March, A. D. 1897; hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 23rd day
(U. S. Cir. Ct. Seal.) of March, 1897. Issued at my office in the city of Duluth, under the seal of said circuit court, the day and year last aforesaid.

HENRY D. LANG, *Clerk*,
By L. DAVIES, *Deputy*.

MEMORANDUM.—The above-named defendant to enter his
42 appearance in this suit in the clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken *pro confesso*.

HENRY D LANG, *Clerk*,
By L. DAVIES, *Deputy*.

DRAPER, DAVIS & HOLLISTER,
Complainant's Solicitors.

That thereafter, to wit, on the 16th day of April, A. D. 1897, said chancery subpœna was returned into court by the marshal for said district, with his return duly endorsed thereon; which said return is, in words and figures, as follows, to wit:

UNITED STATES OF AMERICA, }
District of Minnesota, } *ss*:

I hereby certify and return that after diligent search and inquiry I have been unable to find the within-named defendant within my district.

Dated at Duluth in said district on the 16th day of April, A. D. 1897.

R. T. O'CONNOR,
U. S. Marshal,
By T. J. MONAHAN, *Deputy*.

Indorsed: Returned into the clerk's office and filed this 16th day of April, A. D. 1897. Not found. Henry D. Lang, clerk, by L. Davies, deputy.

That afterward, to wit, on the 22nd day of April, A. D. 1897, there was filed with the clerk of said court a præcipe for alias chancery subpœna, which said præcipe is, in words and figures, as follows, to wit:

Præcipe for Alias Ch. Subpœna.

United States Circuit Court, District of Minnesota, Fifth Division.

CARRIE MOSS
vs.
RICHARD DOWMAN.

Please issue an alias chancery subpœna in the above-entitled cause.

DRAPER, DAVIS & HOLLISTER, *Attorneys*.

To Henry D. Lang, clerk of U. S. circuit court.

Indorsed: Filed April 22nd, 1897. Henry D. Lang, clerk, by L. Davies, deputy.

That on the same day, to wit, on the 22nd day of April, A. D. 1897, there was issued by the clerk of said court, in pursuance
43 to the foregoing præcipe, an alias chancery subpœna, which said alias chancery subpœna is, in words and figures, as follows, to wit:

(Original.)

UNITED STATES OF AMERICA, }
District of Minnesota, Fifth Division. }

The President of the United States of America to Richard Dowman, Greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States, for the district of Minnesota, on the first Monday of June next, at the city of Duluth, then and there to answer the bill of complaint of Carrie Moss, citizen of the State of Minnesota, filed against you on the 23rd day of March, A. D. 1897; hence fail not.

(Seal U. S. Cir. Ct., 5th Div.)

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 22nd day of April, 1897. Issued at my office in the city of Duluth, under the seal of said circuit court, the day and year last aforesaid.

HENRY D. LANG, *Clerk*,
By L. DAVIES, *Deputy*.

DRAPER, DAVIS & HOLLISTER,
Complainant's Solicitors.

That thereafter, to wit, on the 24th day of April, A. D. 1897, said alias chancery subpœna was returned into court by the marshal for said district, with his return duly endorsed thereon, which said return is, in words and figures, as follows, to wit:

UNITED STATES OF AMERICA, }
District of Minnesota, } *ss:*

I hereby certify and return that I served the annexed chancery subpœna on the therein-named Richard Dowman by handing to and leaving a true and correct copy thereof with him personally at Duluth, in said district, on the 22d day of April, A. D. 1897.

R. T. O'CONNOR, *U. S. Marshal*,
By T. J. MONAHAN, *Deputy*.

Fees, $2.12.

Indorsed: Returned into the clerk's office and filed this 24th day of April, A. D. 1897. Henry D. Lang, clerk, by T. H. Pressnell, deputy.

44 That afterwards, to wit, on the 1st day of June, A. D. 1897, there was filed with the clerk of said court the defendant's appearance, by Towne & Harris, which said appearance is, in words and figures, as follows, to wit:

Notice of Appearance.

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

CARRIE MOSS, Plaintiff,
vs.
RICHARD DOWMAN, Defendant. } In Equity.

To the clerk of said court:

You will please enter our appearance as solicitors for the defendant in the above-entitled action.

Dated June 1st, 1897.

TOWNE & HARRIS,
Solicitors for Defendant.
L. C. HARRIS, *Of Counsel.*

Indorsed: Filed June 1st, 1897. Henry D. Lang, clerk, by L. Davies, deputy.

That afterwards, to wit, on the 3rd day of July, A. D. 1897, there was filed with the clerk of said court a stipulation and order in said cause, which said stipulation and order are, in words and figures, as follows, to wit:

Stipulation.

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

CARRIE MOSS, Complainant,
vs.
RICHARD DOWMAN, Defendant. } No. 264. In Equity.

The defendant in the above-entitled action, Richard Dowman, being absent from the United States and being somewhere in Canada, but his exact whereabouts not being known to his solicitors, it is hereby stipulated by and between the solicitors for the complainant and the defendant in the above-entitled action that the judge of this court may make an order that the demurrer of the defendant to the complaint in this action may be received and filed without the signature and without the oath of said defendant to said demurrer to the same effect and purpose as if the said demurrer had been signed and sworn to by the said defendant, Richard Dowman; provided, however, that the said demurrer shall be certified to by counsel for said defendant as provided by the
45 rules of said court, and that counsel for said defendant shall also make oath to said demurrer that it is not interposed for the purpose of delay.

DRAPER, DAVIS & HOLLISTER,
Solicitors for the Complainant.
TOWNE & HARRIS,
Solicitors for the Defendant.

Duluth, Minn., June 25, 1897.

Order.

Upon reading the above and foregoing stipulation it is hereby ordered that the demurrer to the bill of complaint in the above-entitled action may be received and filed without the signature and without the oath of the said defendant, Richard Dowman, to the same effect and purpose as though the said demurrer had been signed and sworn to by the said defendant, Richard Dowman.

It is hereby further ordered that the said demurrer shall be certified to by the counsel for said defendant, Richard Dowman, and that the said counsel shall make oath that the said demurrer is not interposed for the purpose of delay.

June 26, 1897.

WM. LOCHREN, *Judge.*

Indorsed: Filed July 3rd, 1897. Henry D. Lang, clerk, by L. Davies, deputy.

That on the same day, to wit, on the 3rd day of July, A. D. 1897, there was filed with the clerk of said court the defendant's demurrer to the complaint herein, which said demurrer is, in words and figures, as follows, to wit:

Demurrer.

In the Circuit Court of the United States, District of Minnesota, Fifth District.

CARRIE MOSS, Complainant,
vs.
RICHARD DOWMAN, Defendant. } No. —. In Equity.

The demurrer of the above-named defendant, Richard Dowman, to the bill of complaint of the above-named plaintiff, Carrie Moss.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint to be true in such manner and form as are therein set forth and alleged, doth demur to the said bill, and the whole thereof, and for cause of demurrer showeth that the said complainant has not, by her
46 said bill, made such a cause as entitles her, in a court of equity, to any discovery from this defendant, or any relief against him, as to the matters contained in said bill, or any such matters; and that any discovery which could be made by this defendant, touching the matters complained of in said bill, or any of them, cannot be of avail to the said complainant for any of the purposes for which such a discovery is sought against this defendant by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of.

And for further and more specific grounds of demurrer this defendant avers as follows, to wit:

1. The averments of the bill of complaint, in conjunction with the exhibits made a part thereof, show that the said complainant is precluded from raising the question as to whether said defendant settled upon and built a residence on the land in question previous to October 24th, 1890, the time when the said complainant offered to file upon said land, and that the said complainant is precluded from raising the question as to whether or not the finding of the said Secretary of the Interior on said matter was erroneous, for the reason that said matter is a question of fact, and it affirmatively and manifestly appears from said bill and the exhibits made a part thereof that the various officers of the Land Department, including the Secretary of the Interior, examined and passed upon a large amount of testimony on this point, and the decisions of said officers upon questions of fact are final and conclusive, and will not be reviewed by courts of equity.

2. The averments of the bill of complaint, in conjunction with the exhibits made a part thereof, show that the said complainant is precluded from raising the question as to whether or not the defendant was in the actual physical possession of said land on the 24th day of October, 1890, at the instant the said complainant offered her filing on said land, and that said complainant is precluded from raising the question as to whether or not the finding of the said Secretary of the Interior on said matter was erroneous, for the reason that said matter is a question of fact, and it affirmatively and manifestly appears from said bill of complaint and the exhibits made a part thereof that the various officers of the Land Department, including the Secretary of the Interior, examined and passed upon a large amount of testimony on that question, and the decisions of said officers upon questions of fact are final and conclusive, and will not be reviewed by courts of equity.

3. The averments of the bill of complaint, in conjunction with the exhibits made a part thereof, show that the complain-
47 ant is precluded from raising the question as to whether or not the said defendant had made any cultivation on said land, and is precluded from raising the point that the Secretary of the Interior failed to make any finding of fact in his said decision complained of that the said defendant had ever cultivated any portion of said land, for the reason that it appears on the face of the bill and the exhibits made a part thereof that the only question at issue between the complainant and the defendant in the said contest presented to and passed upon by the said Secretary of the Interior was the question as to whether the complainant or the defendant had the better right to said land on the 24th day of October, 1890, and under the laws of the United States, and under the practice and procedure of the Land Department in such cases, the question of cultivation is not a question for consideration, and that the question of cultivation can only come before the Land Department for consideration and decision upon a hearing on final proof, or upon a contest specially instituted for failure to comply with the law as to cultivation.

4. Conceding that the question of cultivation was a material

question to be considered by the said Secretary upon the said contest between the complainant and defendant, it appears upon the face of said bill, in conjunction with the exhibits made a part thereof, that evidence was taken on the question of cultivation by said defendant upon said land, from which it appears that the defendant had cultivated said land.

That it appears that said evidence was presented to and was considered by said Secretary before making his said decision on said contest.

That said question is a question of fact, and the decision of said Secretary upon questions of fact is final and conclusive, and will not be reviewed by courts of equity.

5. That it appears upon the face of said bill of complaint, in conjunction with the exhibits made a part thereof, that evidence was adduced on the hearing of said contest between complainant and defendant, that said defendant was actually upon the land in question on the 24th day of October, 1890, at the instant that the said complainant made her homestead filing upon said land, and that the said Secretary considered and passed upon the sufficiency of said evidence in making his said decision complained of in said bill of complaint.

That upon this state of facts it was not error upon the part of said Secretary to hold that said defendant had a better right to the land in question than the complainant on the 24th day of Oc-
48 tober, 1890, even though it appeared on the record, as it did, that up to the moment that the said complainant offered her said filing the said land was covered by the homestead filing of one Richard Doran, for the reason that under the statutes of the United States it is the law, and under the uniform decisions of the Land Department for the past fifteen years it has been held to be the law, that where a qualified person settled in good faith upon public land, with the intention of acquiring the same, and the said land is covered by the filing of another at the time of said settlement, that the right of said settler to said land attaches instantly upon the filing of a relinquishment by the party who had a filing thereon at the time of said settlement, and his right is prior and better than the right of a person who purchases a relinquishment from the party who had a filing on the land, and who offers to file immediately upon the acceptance of said relinquishment.

6. And defendant assigns as a further reason why the decision of said Secretary on the point last above mentioned was not erroneous, that it appears on the face of said bill of complaint, in conjunction with the exhibits made a part thereof, that the filing of the said Richard Doran, which covered the land in question at the time the said defendant settled thereon, was illegal and was erroneously allowed, and that the said Doran did not and could not have obtained any right, title, or interest in or to said land by virtue of said filing.

7. And defendant further avers that as to all questions concerning the settlement, residence, improvements, and cultivation of said land by said defendant, and as to the sufficiency thereof, and as to

the good faith of said defendant in making his said settlement, and his acts subsequent thereto, that it affirmatively and manifestly appears upon the face of the said bill of complaint and the exhibits made a part thereof that evidence was adduced, presented to, and passed upon by the said Secretary on all of said questions in making his said decision on the said contest between complainant and defendant.

And defendant further avers, as reason for demurrer, that under the statutes of the United States the Land Department is constituted a special tribunal, with judicial powers, to consider and determine all such questions, and that the decisions of said tribunal on the questions of settlement, residence, improvement, cultivation, and good faith, and the sufficiency of the evidence to establish each and all of these matters, are final and conclusive, and cannot be reviewed in either a court of law or of equity.

Wherefore, and for divers other good causes of demurrer appearing on the face of said bill of complaint and the exhibits
49 made a part thereof, this defendant doth demur thereto. And he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill, and he humbly prays to be hence dismissed, with his reasonable costs in this behalf sustained.

L. C. HARRIS,

Solicitor and of Counsel for Defendant, Richard Dowman,
700 and 701 Torrey Bldg., Duluth, Minnesota.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

L. C. HARRIS,

Of Counsel for Defendant, Richard Dowman.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

L. C. Harris, being duly sworn, deposes and says: I am one of the solicitors and of counsel for the above-named defendant; that the foregoing demurrer is not interposed for delay.

That the reason this affidavit is not made by said defendant is that he is absent from the United States and is somewhere in Canada, and that this affidavit is made by counsel for defendant pursuant to a stipulation between the solicitors for complainant and defendant, and an order of this honorable court made upon said stipulation, both of which are on file in this court.

L. C. HARRIS.

Subscribed and sworn to before me this 3rd day of July, A. D. 1897.

[NOTARIAL SEAL.] H. B. FRYBERGER,

Notary Public in and for said St. Louis County, Minnesota.

Indorsed: Filed July 3rd, 1897. Henry D. Lang, clerk, by L. Davies, deputy.

That afterwards, to wit, on the 24th day of September, A. D. 1897, there was filed with the clerk of said court a note of issue in said cause, which said note of issue is, in words and figures, as follows, to wit:

50 *Note of Issue.*

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

CARRIE MOSS, Complainant,
vs.
RICHARD DOWMAN, Defendant. } No. —. In Equity.

Issue of last pleading filed July 6, A. D. 1897.

DRAPER, DAVIS & HOLLISTER,
Solicitors for Complainant.
TOWNE & HARRIS,
Solicitors for Defendant.

Will the clerk please file this note of issue and enter the cause on the calendar for the October, A. D. 1897, general term of this court?

Yours, &c., TOWNE & HARRIS,
Solicitors for Defendant.

L. C. HARRIS,
Of Counsel for Defendant.

Indorsed: Filed Sept. 24, 1897. Henry D. Lang, clerk, by Thos. H. Pressnell, deputy.

That afterwards, to wit, on the 14th day of October, A. D. 1897, the following proceedings were had in said cause in open court, to wit:

United States Circuit Court for the District of Minnesota, Fifth Division.

Term Minutes, October Term, A. D. 1897.

THURSDAY MORNING, *October 14th*, 1897.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, judge; Edward C. Stringer, U. S. dist. att'y; R. T. O'Connor, U. S. marshal; Henry D. Lang, clerk.

* * * * * * *

CARRIE MOSS, Plaintiff,
vs.
RICHARD DOWMAN, Defendant. } No. 264.

This cause being regularly on the calendar comes on for hearing of the argument upon the demurrer. Messrs. Draper, Davis & Hollister appeared for the complainant. L. C. Harris ap-
51 peared and argued said demurrer on behalf of the defendant; and said argument not being concluded at the hour of adjournment, it is by the court—

Ordered that further proceedings herein be and the same hereby are postponed and continued until tomorrow afternoon at seven o'clock.

* * * * * * *

Ordered that this court do now adjourn until tomorrow morning at 9.30 o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

That afterwards, to wit, on the 15th day of October, A. D. 1897, the following proceedings were had in said cause in open court, to wit:

United States Circuit Court for the District of Minnesota, Fifth Division.

Term Minutes, October Term, A. D. 1897.

FRIDAY MORNING, *October 15th*, 1897.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, judge; Edward C. Stringer, U. S. dist. att'y; R. T. O'Connor, U. S. marshal; Henry D. Lang, clerk.

* * * * * * *

CARRIE MOSS, Plaintiff,
vs.
RICHARD DOWMAN, Defendant. } No. 264.

This day come again the parties to this cause, the complainant appearing by her counsel Messrs. Draper, Davis & Hollister and J. K. Reddington, and the defendant by his counsel, Mr. L. C. Harris, and the argument of the defendant's demurrer is resumed and continued.

Mr. J. K. Reddington argued against the demurrer on the part of the plaintiff, and

Mr. L. C. Harris argues in reply upon said demurrer in favor of the defendant, and after hearing the counsel for the respective parties hereto, and the court being fully advised in the premises, the same is duly submitted and by the court taken under advisement.

* * * * * * *

Ordered that this court do now adjourn until tomorrow morning at 9.30 o'clock.

Attest: HENRY D. LANG, *Clerk,*
By THOS. H. PRESSNELL, *Deputy.*

52 That afterwards, to wit, on the 26th day of October, A. D. 1897, there was filed with the clerk of said court, the decision of the court in said cause, which said decision is, in words and figures, as follows, to wit:

Decision.

Circuit Court of the United States, District of Minnesota, Fifth Division.

CARRIE MOSS, Complainant,
vs.
RICHARD DOWMAN, Defendant.

This case is heard upon demurrer to the complainant's bill of complaint, the allegations of which so far as they need be noticed are to the effect that on May 7, 1890, one Robert H. Doran filed in the U. S. land office at Duluth, Minnesota, his application to enter as a homestead the southeast quarter of section 22, of township 65, north of range 4 west 4th principal meridian in the Duluth land district, which was then subject to such entry and unappropriated, and that the register and receiver of said land office allowed said application, and delivered to said Doran the receiver's duplicate receipt or certificate of original entry of said land, acknowledging the receipt of the proper fees for such entry; and that such entry was noted on the books and plats in said land office, and duly returned and reported to the Commissioner of the General Land Office with the proofs on which it was founded, and there duly entered upon the books and records of the General Land Office. That by law and the rules of General Land Office, any person making such entry is allowed six calendar months from and (—) the entry within which to begin settlement and residence upon the land so entered without forfeiture of any rights acquired by such entry.

That within such period of six months from said entry and on October 24, 1890, in consideration of the sum of $1,000 then paid to him therefor by the complainant, said Robert H. Doran executed and delivered to the complainant, to be filed by her in said Duluth land office, an instrument of writing assigning and relinquishing to the United States, all his right, interest and claim to said land, and requesting that his said entry be cancelled, such instrument being written and executed on the back of his original duplicate receipt aforesaid. That on said 24th day of October, 1890, at from 11 to 11.30 o'clock in the forenoon the complainant filed said instrument of relinquishment in said Duluth land office, and at the same time filed therewith her application to enter the same land
53 as her homestead; and that the register and receiver then canceled upon their records the said entry of said Robert H. Doran, and accepted and allowed the said application of the complainant, and made the proper entries thereof upon the plats and books in their office, and issued and delivered to her the proper duplicate receipt or certificate of entry of said lands, acknowledging payment of the proper fees, and that such entry by complainant was duly reported to and entered of record in the General Land Office, and that within six months thereafter on April 22, 1891, the complainant, with servants, household goods, utensils and provis-

ions, entered and made settlement on said land, and began to erect, and completed, residing on said land a dwelling-house at a cost of more than $700 and cultivated the land making and intending to make it her home, residing thereon continually, and expending in such cultivation and in other buildings and improvements on said land a large sum of money.

That on November 24, 1890, the defendant Richard Dowman made application to the register and receiver of said Duluth land office to enter the same land as his homestead, alleging that he had made settlement upon said land on the 19th day of September, 1890, and had erected a house thereon and was in possession of said land on the 24th day of October, 1890, and entitled to enter said land as his homestead.

It is further alleged that by direction of the Commissioner of the General Land Office a hearing was had before the register and receiver of the Duluth land office, in the months of June and July 1892, upon testimony then taken to determine the rights of the respective parties. It is needless to follow the allegations of the proceedings before these officers, or their decisions or that the Commissioner of the General Land Office upon appeal, as the bill alleges on appeal to the Secretary of the Interior, and his decision thereon which is referred to as reported in full in vol. 19, Land Decisions, page 526. This decision of the Secretary in favor of Richard Dowman and against the complainant is alleged to be erroneous and contrary to law.

The facts found by the Secretary upon the evidence, are conclusive upon the parties and cannot be re-examined; and the only question is whether his decision, based on those facts, was in accordance with law. He finds from the evidence that from February 6, 1885, until October 24, 1890, divers persons had consecutively made filings of homestead entries of this land without in that time making any settlement thereon; and that each of such persons at or near the expiration of six months after making his entry filed a relinquishment thereof, immediately followed by a like entry of another,
54 until the entry by the complainant on October 24, 1890, and her settlement on the land April 22, 1891.

Also that Richard Dowman, who applied on November 18, 1890, to make homestead entry on the land, and made actual settlement on the land September 19, 1890, and then began the construction of a house thereon which he finished Oct. 10, 1890, making his home there and actually living there continuously until November, 1890, except a trip to the county town, for provisions, made October 19, 1890, returning to the land October 24, 1890, the day when Doran's relinquishment was filed; and that his residence continued on the land thereafter till the hearing, except temporary absences on proper occasions and not implying bad faith. The Secretary found that under the circumstances of the case the settlement of Dowman upon the land September 19, 1890, was made in good faith; and that his residence and settlement on the land continued while he was temporarily absent for provisions from Oct. 19, to Oct. 24, 1890, and that it was immaterial whether he was actually in

person on the land on the latter day at the instant when Doran's relinquishment was filed; and that being such actual settler residing on the land at the time such relinquishment was filed, his rights as such settler attached at that instant, and prior and superior to any rights that were acquired by the complainant by her application for entry, filed with the said relinquishment.

I think the Secretary was clearly right. The idea that Doran by handing his instrument of relinquishment to the complainant for filing, even though for a large consideration, could invest the complainant with his rights or with any rights, is inadmissible. The filing of the relinquishment left the land open to appropriation; and the earliest appropriation of it under the land laws would attach to and hold the land. The arrangement gave the complainant opportunity to act quickly, but if the right of another attached more speedily she would fail. Dowman was then on the land, an actual resident and settler. While Doran's entry continued Dowman could acquire no right by settlement, but the instant that entry was relinquished his right as settler attached, and no new entry however "simultaneous" with the relinquishment could be thrust in between Doran's relinquishment and Dowman's rights as a settler upon the land.

That Dowman had acquired no rights by his settlement prior to Doran's relinquishment, and might as respects Doran have been regarded as a trespasser makes no difference. When Doran relinquished Dowman ceased to be a trespasser, and was not only an actual but a lawful settler. There was no evidence of *mala*
55 *fides* about Dowman's settlement which should affect its legality when the time came for a right to attach to it under the land laws. Neither Doran nor any of the long line of speculative homesteaders who had kept up holdings by entries and relinquishments every six months had ever appeared on the land. The object of the homestead laws is not to encourage speculation but settlement, and if Dowman knew all the antecedent facts, he might well expect that an actual settler would acquire the right to the land, lawfully, upon the next relinquishment, and make his settlement as the Secretary finds as a fact that it was made—in good faith.

I will not dwell upon the argument urged by the complainant based on the alleged fact of the "simultaneous" delivery to and acceptance by the officers of the land office of Doran's relinquishment and complainant's application to enter. No two acts could be so simultaneous as to shut out the effect of a fact existing at the time. To illustrate. Suppose A for a valuable consideration paid him by B sells to B a tract of land, there being at the time a judgment against B docketed in the county. Before receiving his deed from A suppose B sells the same land to C, and that B makes his deed to C, handing it to A, with directions to deliver it to C, and also deliver A's deed of the land to B at the same time to C, and that both deeds are at the same time and in one envelope delivered by A to C, who passes both in the same manner to the register of deeds, and they are noted as received for record at the same hour

and minute. The simultaneousness of these deliveries will not prevent the lien of the docketed judgment upon the land, as the land of B under A's deed to him, although delivered simultaneous with his own deed to C.

The demurrer is sustained and decree will be entered dismissing the bill with costs.

WM. LOCHREN, *Judge.*

Indorsed: Filed Oct. 26, 1897. Henry D. Lang, clerk, by Thos. H. Pressnell, deputy.

That afterwards, to wit, on the 4th day of November, A. D. 1897, the following proceedings were had in said cause, in open court, to wit:

56 United States Circuit Court for the District of Minnesota, Fifth Division.

Term Minutes, October Term, A. D. 1897.

THURSDAY MORNING, *November 4th*, 1897.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, judge; R. T. O'Connor, U. S. marshal; by J. M. Redding, deputy; Henry D. Lang, clerk.

* * * * * * *

CARRIE MOSS, Plaintiff,
vs.
RICHARD DOWMAN, Defendant. } No. 264.

This cause having been heretofore duly heard and determined, and the court having made and filed its decision and directed the entry of a decree in accordance with the said decision,

Now comes the defendant, by his solicitor, L. C. Harris, Esq., and presents and moves the court to make, file and enter its decree herein, which is accordingly done, in words and figures following, to wit:

This cause came on to be heard, at this term, on a demurrer to the bill of complaint, and was argued by counsel for both complainant and defendant; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

I.

It is ordered, adjudged and decreed that the demurrer to the bill of complaint be and the same is hereby sustained.

II.

It is ordered, adjudged and decreed that the bill of complaint be and the same is hereby dismissed.

III.

It is ordered, adjudged and decreed that the said defendant have and recover from said complainant the costs and disbursements of this action, taxed at $27.55.

WM. LOCHREN, *Judge.*

Dated this 4th day of November, 1897.

* * * * * * *

Ordered that this court do now adjourn until tomorrow morning at 9:30 o'clock.

A true record.

Attest: HENRY D. LANG, *Clerk.*

57 That afterwards, to wit, on the 23rd day of November, A. D. 1897, there was filed with the clerk of said court the notice of taxation of costs in said cause, and on the same day, to wit, on said 23rd day of November, 1897, said costs were duly taxed by said clerk, which said notice and taxation are in words and figures as follows, to wit:

STATE OF MINNESOTA, } ss:
County of St. Louis, }

United States Circuit Court, District of Minnesota, Fifth Division.

CARRIE MOSS, Complainant, }
vs.
RICHARD DOWMAN, Defendant. }

Bill of Costs and Notice of Taxation.

Costs by statute..... $20.00

Disbursements.

Clerk's fees (to be taxed)..... 7.55

$27.55

The above bill of costs and disbursements taxed and allowed at $27.55.

Dated this 23d day of November, 1897.

HENRY D. LANG, *Clerk,*
By THOS. H. PRESSNELL, *Deputy.*

STATE OF MINNESOTA, } ss:
County of St. Louis, }

L. C. Harris, being duly sworn, on oath says that he is one of the solicitors of the defendant in the cause above entitled; that the foregoing is a true and correct statement of the costs and disbursements of said defendant in the above-entitled proceeding, and that all of

the items of said disbursements have been actually and necessarily paid or incurred therein by and on behalf of said defendant.

L. C. HARRIS.

Subscribed and sworn to before me this 29th day of Oct., A. D. 1897.

WM. HARRISON,
Notary Public, Minnesota.

[NOTARIAL SEAL.]

SIR-: Please take notice that the costs and disbursements of the defendant in the foregoing-entitled action will be taxed by and before Thos. Pressnell, clerk of the above-named court, at his office in the Government bldg., at Duluth, Minnesota, on Tuesday, the 2nd day of November, 1897, at 10 o'clock in the forenoon of said day, and that the foregoing is a statement of the items of costs and disbursements that will then and there be claimed on behalf
58 of said defendant and inserted in the judgment in said action that will then and there be entered.

Very respectfully, TOWNE & HARRIS,
Solicitors for Defendant.

To Draper, Davis & Hollister, solicitors for complainant.

Indorsed: Due service of the within notice is admitted this 29th day of October, A. D. 1897. Draper, Davis & Hollister, sols. for complainant. Filed Nov. 23, 1897. Henry D. Lang, clerk, by Thos. H. Pressnell, deputy.

That afterwards, to wit, on the 15th day of December, A. D. 1897, there was filed with the clerk of said court appellant's assignment of errors in said cause, which said assignment of errors is in words and figures as follows, to wit:

Circuit Court of Appeals of the United States for the Eighth Circuit.

CARRIE MOSS, Appellant,
vs.
RICHARD DOWMAN, Respondent.

And now comes said appellant, on this 15th day of December, 1897, and says that the order and decree made in said cause on the 4th day of November, 1897, is erroneous and against the just rights of appellant, for the following reasons:

I.

Because the facts stated in appellant's bill of complaint justly entitles her to the equitable relief prayed for therein.

II.

Because the demurrer of said respondent to appellant's bill of complaint ought to have been overruled.

III.

Because the circuit court of the United States for the district of Minnesota, fifth division, in equity, erred in sustaining respondent's demurrer and dismissing appellant's bill of complaint.

Wherefore, said appellant prays that said order and decree be reversed and said circuit court be directed to enter a decree in said cause according to the prayer of the bill of complaint.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Appellant, 400–406 *First National Bank Bldg., Duluth, Minn.*

JAMES K. REDDINGTON,
W. R. DRAPER, *Of Counsel.*

Indorsed: Filed Dec. 15th, 1897. Henry D. Lang, clerk.

59 That on the same day, to wit, on the 15th day of December, A. D. 1897, there was filed with the clerk of said court the appeal in said cause, which said appeal is in words and figures as follows, to wit:

Circuit Court of the United States, District of Minnesota, Fifth Division.

CARRIE MOSS, Complainant,
vs.
RICHARD DOWMAN, Defendant. } In Equity.

The above-named complainant conceiving herself aggrieved by the order entered in said cause on the 4th day of November, 1897, doth hereby appeal from said court to the circuit court of appeals of the United States for the eighth circuit, for the reasons specified in the assignment of error which is filed herewith, and prays that her appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the circuit court of appeals of the United States for the eighth circuit.

DRAPER, DAVIS & HOLLISTER,
Solicitors for Complainant and Appellant, 400–406 *First National Bank Bldg., Duluth, Minn.*

JAMES K. REDDINGTON,
W. R. DRAPER, *Of Counsel.*

Duluth, Minnesota, December 15th, 1897.

And now, to wit, on December 15th, 1897, it is ordered that the appeal be allowed as prayed for.

WM. LOCHREN,
District Judge.

Indorsed: Filed Dec. 15th, 1897. Henry D. Lang, clerk.

That on the same day, to wit, on the 15th day of December, A. D. 1897, there was filed with the clerk of said court the bond on appeal in said cause, which said bond is, in words and figures, as follows, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

CARRIE MOSS, Appellant,
vs.
RICHARD DOWMAN, Respondent.

Know all men by these presents, that we, Carrie Moss as principal, and A. L. Ordean and John H. Dight as sureties, are held and firmly bound unto the respondent, Richard Dowman, in the full and just sum of five hundred dollars ($500.00) to be paid
60 to the said Richard Dowman, his certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated the 15th day of December in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately, at a circuit court of the United States for the district of Minnesota, fifth division, in equity, in a suit pending therein between Carrie Moss, complainant, and Richard Dowman, defendant, a decree was rendered against the said Carrie Moss, sustaining the demurrer of the said defendant to her bill of complaint, and dismissing said bill, with costs, and said Carrie Moss having obtained an appeal from said decree to the United States circuit court of appeals for the eighth circuit and filed a copy thereof in the clerk's office of the said court, to reverse said decree in said suit, and a citation, directed to the said Richard Dowman, citing and admonishing him to be and appear at a session of the United States circuit court of appeals for the eighth circuit, to be holden at the city of St. Paul, in the said circuit, on the 14th day of January next:

Now the condition of the above obligation is such that if the said Carrie Moss shall prosecute her said appeal to effect, and answer all damages and costs if she shall fail to make the said plea good, then the above obligation to be void: otherwise, to remain in full force and virtue.

CHARLES MOSS. [SEAL.]
A. L. ORDEAN. [SEAL.]
JOHN H. DIGHT. [SEAL.]

Sealed in presence of—
THOS. J. DAVIS,
W. N. DRAPER.

Approved:
WM. LOCHREN, *Judge.*

STATE OF MINNESOTA, } ss:
County of St. Louis, }

A. L. Ordean and J. H. Dight being duly sworn, each for himself deposes and says, that he is the identical person who executed the foregoing instrument; that he is worth the sum of one thousand dollars ($1,000.00) over and above all his liabilities and exemptions.

A. L. ORDEAN.
JOHN H. DIGHT.

Subscribed and sworn to before me this 15th day of December, 1897.

[NOTARIAL SEAL.] W. N. DRAPER,
Notary Public, St. Louis County, Minn.

61 Indorsed: These sureties are satisfactory to the defendant. Towne & Harris, solicitors for defendant. Filed December 15th, 1897. Henry D. Lang, clerk.

UNITED STATES OF AMERICA, ss:

To Richard Dowman:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals of the eighth circuit, to be holden at the city of St. Paul, in said circuit, on the 14th day of January, 1898, next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Minnesota, fifth division, in equity, wherein Carrie Moss is appellant and you are respondent, to show cause, if any there should be, why the decree rendered against said appellant, as in said appeal mentioned, should not be *created* and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of December, in the year of our Lord, one thousand eight hundred and ninety-seven.

WM. LOCHREN,
District Judge.

U. S. circuit court of appeals, eighth circuit. Carrie Moss, appellant, *vs.* Richard Dowman, respondent. Citation.

Original. Circuit court of appeals of the United States, eighth circuit. Carrie Moss, appellant, *vs.* Richard Dowman, respondent. Citation. Filed December 15th, 1897. Henry D. Lang, clerk. Due service of the within citation by copy is hereby admitted, this 16th day of December, 1897. Towne & Harris, attorneys for Richard Dowman, respondent. Draper, Davis & Hollister, att'ys for appellant, 400–406 First Nat. Bank bldg., Duluth, Minn.

UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Fifth Division.

I, Henry D. Lang, clerk of said circuit court, do hereby certify and return to the honorable, the United States, *the* (*United States*) circuit court of appeals for the eighth circuit, that the foregoing, consisting of 86 pages, numbered consecutively from 1 to 86 inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, and all other proceedings in said cause, and of the whole thereof, as appears from the original
62 records and files of said court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

Seal U. S. Circuit Court, Fifth Division, Dist. of Minnesota.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at Duluth, in the district of Minnesota, this 20th day of December, A. D. 1897.

HENRY D. LANG, *Clerk*,
By THOMAS H. PRESSNELL, *Deputy*.

Filed Jan. 14, 1898.

JOHN D. JORDAN, *Clerk*.

63 And on the fourteenth day of January, A. D. 1898, an appearance of Mr. Thomas J. Davis, counsel for appellant, was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

CARRIE MOSS, Appellant,
vs.
RICHARD DOWMAN. } No. 1041.

The clerk will enter my appearance as counsel for the appellant.
THOMAS J. DAVIS.

JAMES K. REDINGTON, *Of Counsel*.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1897. No. 1041. Carrie Moss, appellant, *vs.* Richard Dowman. Appearance. Filed Jan. 14, 1898. John D. Jordan, clerk. Thos. J. Davis, att'y, & James K. Redington, of counsel for appellant.

And on the eighteenth day of March, A. D. 1898, an appearance of counsel for appellee was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

CARRIE MOSS, Appellant,
vs.
RICHARD DOWMAN, Appellee. } No. 1041.

The clerk will enter my appearance as counsel for the appellee.
L. C. HARRIS.

Endorsed: U. S. circuit court of appeals, eighth circuit, December term, 1897. No. 1041. Carrie Moss, appellant, *vs.* Richard Dowman. Appearance. Filed Mar. 18, 1898. John D. Jordan, clerk. L. C. Harris, counsel for appellee.

64 And on the sixteenth day of May, A. D. 1898, an appearance of Mr. James K. Redington, counsel for appellant, was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1898.

CARRIE MOSS, Appellant,
vs.
RICHARD DOWMAN. } No. 1041.

The clerk will enter my appearance as counsel for the appellant.
JAMES K. REDINGTON.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1898. No. 1041. Carrie Moss, appellant, *vs.* Richard Dowman. Appearance. Filed May 16, 1898. John D. Jordan, clerk. James K. Redington, Washington, D. C., counsel for appellant.

And on the sixteenth day of May, A. D. 1898, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1898.

MONDAY, *May* 16, 1898.

CARRIE MOSS, Appellant,
vs.
RICHARD DOWMAN, Appellee. } No. 1041.

Appeal from the circuit court of the United States for the district of Minnesota.

This cause having been called for hearing in its regular order, argument was commenced by Mr. James K. Redington, for appellant, continued by Mr. L. C. Harris, for appellee, and concluded by Mr. James K. Redington, for appellant.

Thereupon this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

65 And on the twenty-seventh day of June, A. D. 1898, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

66 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1898.

CARRIE MOSS, Appellant, *vs.* RICHARD DOWMAN, Appellee. } No. 1041. Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. James K. Redington (Mr. Warren N. Draper was with him on the brief) for appellant.
Mr. L. C. Harris for appellee.

Before Sanborn and Thayer, circuit judges, and Shiras, district judge.

The bill in this case was filed in the circuit court for the district of Minnesota, for the purpose of determining the ownership of 160 acres of land situated in that State, as between the complainant and defendant, it appearing that the legal title of the land is vested in the defendant, Richard Dowman, under a patent of the United States duly issued to him under date of March 17, 1897.

A demurrer to the bill was filed and after argument, was sustained by the circuit court, the bill being dismissed for want of equity, and the complainant now seeks to obtain a reversal of the decree dismissing the bill. From the facts recited in the bill and the exhibits attached thereto it appears that on May 7, 1890, one Robert H. Doran had made a homestead entry of the land in the United States land office at Duluth, Minn., which he subsequently relinquished, and thereupon the complainant filed this relinquishment in the land office and made application to be allowed to enter the same in her own behalf. On November 18, 1890, Richard Dowman, the defendant, filed in the land office an application for the entry of the land as a homestead, accompanied with an affidavit stating that he had made an actual settlement on the land on the 19th of September, 1890, having built a house thereon and that he was in exclusive possession of the premises when Doran's entry was relinquished on the 24th of October, 1890. For the purpose of determining the rights of the parties, hearings were had before the receiver and register of the local land office, who did not agree in their conclusions and the case then went before the Commissioner, who decided in favor of the complainant, Moss, and thereupon an appeal was taken to the Secretary of the Interior, before whom the matter was fully heard and by whom the facts were determined and stated as follows:

67 "The land involved in this controversy lies in the first school district of Cook county, State of Minnesota. This

county is a very large one, being fifty miles long, east and west, and eighteen miles wide, north and south, at the east end, and fifty miles wide north and south at the west end. The northern line of the county is the southern line of Canada.

"The land in controversy lies in the northern central part of Cook county, near the Canadian line. To use a description made by Miss Moss, the defendant, 'the land was situated in the wildest and most unbroken wilderness, without roads, or even foot trails through Minnesota for the settlements, distant by rail from Duluth over nine hundred miles. The nearest post-office is fifty miles away, and telegraph nearly one hundred miles distant.'

"Richard Dowman, the settler and contestant in the case, had lived for a number of years in Grand Marais, the county town of Cook county, distant fifty miles southeast of the land, and in the same school district.

"He was a member of the first district school board, a county commissioner, was unmarried, and his occupation, besides the two county offices, appears to have been that of an explorer and guide for parties going through that part of the country. The evidence does not show that he had any other visible means of support or possessed much money.

"Although numerous persons have made homestead entry of this land, none appear to have done so in good faith, for none appear to have made any settlement during the period of five years it was entered and relinquished every six months. Dowman, according to his own testimony, knowing the land had been thus entered and relinquished a number of times without any of the entrymen attempting to make settlement thereon, went on the land September 19, 1890, and began the construction of a house, which he finished October 10, following. From that time he made the land his home, actually living there continuously until November, 1890, with the one exception of a trip to the county town for provisions, which he made October 19, 1890, returning October 24, 1890, the day Doran's relinquishment was filed.

"From November 1, 1890, to the date of the hearing, he has been temporarily absent for days at a time in Grand Marais, the county town of Cook county, a village of one hundred and twenty inhabitants, but which, although fifty miles distant, lies in the same school district as does the land in controversy.

"This absenteeism appears owing largely to the fact that Dowman was a member of the school board and a county commissioner, two distinct offices, and to fulfill the duties of which he was compelled to go to the county town. The county town was also the nearest point at which provisions could be obtained. Owing to the distance, the absence of transportation and the difficulties of the route, it required two days to make the trip, and Dowman appears to have on occasions been absent quite a number of days at a time from his claim. But this does not necessarily show bad faith, and the department always presumes temporary absences to be for good reasons, and before a contrary reason will be accepted, facts must be disclosed which prove it.

68 "In this case no such facts have been produced and nothing to show Dowman had any other home than that on the land in controversy, beyond a room, over the store of a friend, which he occupied in the county town on these visits.

"Moss was a school teacher in Grand Rapids, Michigan, and had taught school in cities for a period of twenty years. She was unmarried, about forty years of age, and had $4,000 in cash and a farm in Dakota yielding an income of from $100 to $250 per annum, while her salary was $60 per month; she bought the relinquishment of the land solely on the representations of her Dakota agent, from Doran, who, as previously shown, had been erroneously allowed to make entry of the land.

"Without knowing anything of the land except from her agent, and without ever having been nearer than one hundred and sixty miles on an air line and nine hundred miles by rail, she paid $1,000 for the relinquishment.

"The evidence shows that at that time Dowman was a settler living upon the land.

"Returning to Grand Rapids, Michigan, over one thousand miles from the land by the nearest route, although she had sworn she made entry on the land with the purpose of making settlement thereon, Moss continued to teach school until the latter part of March, five months after her entry, and after she had been served with a notice of Dowman's contest.

"The following month she made the trip to the land, arriving there two days before the expiration of the first six months after her entry. Pitching a tent within sight of Dowman's house, in which he was living, she began the erection of improvements so near to Dowman's cabin that the clearings joined, erecting a residence that cost $700, and all the furniture and conveniences, that money could buy to make it comfortable for a woman to reside in. All this expenditure and improvement were made in the face and with a knowledge of Dowman's claim and prior settlement, and therefore made at Moss' own risk, and it would appear, for the purpose of defeating his claim, if possible, by means of superior improvements, in spite of the long-established and well-known ruling of this department in such cases.

"The character or value of Moss' improvements gives her no advantage. Because she had more money than Dowman to expend on improvements does not detract from his rights.

"In view of these facts and that no evidence has been introduced which shows that Dowman's settlement was not made in good faith, under the established ruling of this department, the settler Dowman's right attached instantly on the filing of Doran's relinquishment, and is therefore superior to Moss' entry."

Based upon this decision, the Land Department issued a patent of the land to Richard Dowman, and thereupon the present bill was filed, in which it is prayed that complainant be adjudged to be the owner of the land and that the defendant holds the legal title as trustee for complainant.

69 SHIRAS, district judge, after stating the case as above, delivered the opinion of the court.

In the brief filed by counsel for appellant, it is admitted that it is well settled that "All questions of fact presented and decided in a controverted proceeding where both parties are heard, are concluded, by the department decision and are binding on the court. But where the officers of the Land Department have, by a mistake of law, given to one man the land which, upon the facts found, belongs to another, equity will grant relief by putting the title where of right it ought to be."

In this case it appears that a controverted proceeding was had between the parties before the Secretary of the Interior, in which it has been decided that at the time, to wit, October 24, 1890, when complainant made application to enter the land, Dowman was then a settler thereon in good faith, and this being true as a matter of fact, the only question of law arising thereon is whether the complainant could make a homestead entry thereof which would be effectual against the pre-existing actual occupancy of Dowman. On behalf of appellant it is argued that Dowman cannot be permitted to take advantage of the entry and occupation by him initiated September 19, 1890, because the land was not then open to homestead entry by reason of the then pending application of Doran; that the land being thus segregated from the public lands open to entry, the attempt of Dowman to obtain a settlement was illegal, and the attempted entry being illegal no rights can grow out thereof, on the principle that no person should be permitted to obtain an advantage by reason of his own wrong or illegal acts. The action of Dowman in going upon the land for the purpose of making a homestead thereon was not illegal or wrongful within the meaning of the rule invoked.

When Dowman's entry was made no one was upon the land, and there was nothing to show that any one claimed it, except the entry of Doran's application on the records of the land office at Duluth, some hundreds of miles distant. If Doran's application had ripened into a title Dowman's actual entry on and settlement of the land would have been ineffectual to defeat it, but it would be effectual and legal against all parties whose rights were acquired subsequent to the entry thus made.

By the relinquishment of Doran's claim the land became again subject to entry, and Dowman's actual possession and occupancy at once became effectual in his favor.

His action in taking possession in September and continuing the same thereafter might have been ineffectual as against Doran, but such action was not illegal and wrongful in such sense that he cannot claim the benefit thereof as against the appellant, whose entry was not made until the 24th day of October, 1890. The facts show that Doran's entry was relinquished on that day, and the land was then restored to the unappropriated public domain. When this restoration of the land took place Dowman was a settler thereon in good faith, living on the land and his rights attached as soon as the land be-

came subject to entry. The facts, as found by the Secretary of the Interior, show that Dowman was in possession of the land, in good faith for homestead purposes, during the whole of the 24th day of October, 1890, and as a matter of fact it is impossible for the appellant to show that when she filed her application in the land office on that day, the land was not then in the possession of Dowman and she is of ne-
70 cessity driven to claim, as matter of law, that Dowman's entry was illegal and wrongful and that as her application was filed in the land office at the same time she filed the Doran relinquishment, she becomes entitled to the benefit of the Doran entry, as against the effect of the existing possession by Dowman. The evidence shows that appellant paid Doran one thousand dollars to relinquish his entry, but by this payment she did not become the assignee of Doran's rights or entry. The payment was made in consideration of Doran relinquishing his entry in order that thereby the land might be restored to the unappropriated public domain, and thus become open to other entries. It is not open to appellant to insist that she is in any sense, the successor to or assignee of the Doran entry. The payment to Doran of the sum named created no equity or right in favor of appellant as against Dowman, and the only legal effect that can be given to the relinquishment executed by Doran, is that thereby the land became again open to appropriation under the homestead act, and being thus released from the effect of the Doran entry, the appellant made application at the land office to enter the land, which application is in law effectual from its date, but the fact, as found by the Secretary of the Interior, is that when this application was made, the land was then occupied by a *bona fide* settler and there is no legal or equitable ground for holding that the right conferred by such prior possession and occupancy must be postponed to the right created by the application filed in the land office.

Counsel for appellant claim that their position is sustained by the ruling of the Supreme Court in Wood *v.* Beach, 156 U. S., 548.

In that case it appeared that Wood in 1870 had occupied certain lands in Kansas seeking to make a homestead thereof, which were within the indemnity limits of a railroad grant then existing, and under which the land had been withdrawn from sale or entry by proper orders of the Land Department entered in 1867. The final selection of the land under the railroad grant was made in 1872, and the deed from the State to which the title passed under the act of Congress was made in 1873, to the defendant Beach. The Supreme Court held that the withdrawal orders in 1867 were sufficient to defeat a settlement for homestead purposes taking effect while the orders were in force, because thereby the land was in fact withdrawn from sale or entry and as the railroad company subsequently perfected its right to the land and made selection thereof its rights could not be defeated by any supposed equities existing in favor of Wood, who made his homestead entry with full knowledge of the facts. This case would be an authority in point, if the present contest was between Doran, claiming under his entry in the land office, and Dowman, claiming under an actual settlement made

after the Doran entry had been filed, but it is not applicable to the question at issue between the present litigants.

In the brief submitted for appellant, counsel have cited many decisions of the Land Department for the purpose of showing that from 1859 to 1885 it was uniformly held "That no right upon cancellation of an entry enured by reason of a settlement made during its existence; that to hold otherwise would be to enable a trespasser to benefit by his own wrong" and it is therefore claimed under the rule of *stare decisis*, that the Secretary made a mistake of law in not following the doctrine claimed to be established
71 by the decisions cited, but counsel further show in their brief that since 1885, modifications of the previous ruling have been made and recognition has been given to settlements made under circumstances similar to those existing in the present case and that since August 20th, 1890, the rulings of the department are to the effect that a settlement made in good faith and prior in time will be held good as against a filing or application tendered simultaneously with the relinquishment or cancellation of a pre-existing entry.

It thus appears that if the Secretary in this case had held that Dowman's entry and settlement, though made in good faith were not available to him upon the relinquishment of Doran's entry, such ruling would have been contrary to that established by the later decisions of the department and certainly it cannot be said that in following the later rulings the Secretary violated any recognized rule of law, and it is only when it is made plain that the officers of the Land Department have, by a mistake of law, deprived a party of land, to which he is rightfully entitled, that a court of equity is justified in setting aside the action of the department. More *v.* Robbins, 96 U. S., 530; Marques *v.* Frisbie, 101 U. S., 473; Quimby *v.* Conlan, 104 U. S., 420.

Being of the opinion that the facts set forth in the bill herein filed do not make a case for the intervention of a court of equity within the rule laid down in the cases cited, it follows that the trial court did not err in dismissing the bill on the merits, and the decree to that effect is—

Affirmed.

Filed June 27, 1898.

72 And on the twenty-seventh day of June, A. D. 1898, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1898.

MONDAY, *June* 27, 1898.

CARRIE MOSS, Appellant,
vs.
RICHARD DOWMAN, Appellee. } No. 1041.

Appeal from the circuit court of the United States for the district of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Richard Dowman have and recover against Carrie Moss the sum of twenty dollars for his costs herein, and have execution therefor.

June 27, 1898.

And on the first day of September, A. D. 1898, an affidavit as to the value of the land in controversy was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals for the Eighth Circuit.

CARRIE MOSS, Appellant,
vs.
RICHARD DOWMAN, Appellee.

STATE OF MICHIGAN, }
County of Ottawa, } *ss:*

Carrie Moss, being first duly sworn, says that she is the
73 appellant in the above-entitled cause; that she is familiar with and knows the value of the southeast quarter of section twenty-two (22), in township sixty-five (65) north of range four (4) west of the fourth principal meridian, in the county of Cook and State of Minnesota, the subject-matter of the controversy in said cause.

That she has been familiar with the condition and value of said land since the month of April, 1891; that on the 23rd day of March, 1897, the date of the filing of the bill of complaint in the circuit court of the United States for the district of Minnesota, said land was worth and of the value of not less than three thousand dollars ($3,000.00); that ever since said last-mentioned date said land has been and it now is of the value of not less than three thousand dollars ($3,000.00).

This affidavit is made as evidence of the value of said land on appeal to the United States Supreme Court.

CARRIE MOSS.

Subscribed and sworn to before me this 20th day of July, A. D. 1898.

[SEAL.] SAM'L O. EAMES,
Notary Public, —— County, Michigan.

Endorsed: No. 1041. United States circuit court of appeals for the eighth circuit. Carrie Moss, appellant, *vs.* Richard Dowman, appellee. Affidavit as to value of land in controversy. Filed Sep. 1, 1898. John D. Jordan, clerk.

And on the first day of September, A. D. 1898, an assignment of errors was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Supreme Court.

CARRIE MOSS, Appellant,
vs.
RICHARD DOWMAN, Appellee.

74 *Assignment of Errors on Appeal to United States Supreme Court.*

Comes now the said appellant, Carrie Moss, by her solicitors, and says that in the record and proceedings in said circuit court of appeals there is manifest error in the following particulars:

I.

In that by the record aforesaid it appears that a decree was entered in favor of said appellee and against said appellant, whereas by the law of the land the said decree ought to have been in favor of said appellant and against said appellee.

II.

In that there was error in said decree of said court of appeals in affirming the decree of the circuit court of the United States for the district of Minnesota, fifth division, because said circuit court in and by its decree erroneously sustained the demurrer to appellant's bill of complaint.

III.

In that there was error in affirming the decree of said circuit court, because said court ought to have overruled said demurrer.

IV.

In that there was error in affirming said decree of said circuit court in sustaining said demurrer, because the facts stated in appellant's bill of complaint justly entitled her to the relief therein prayed for.

V.

In that there was error in affirming said decree of said circuit court, because the same erroneously dismissed appellant's bill of complaint.

VI.

In that there was error in affirming said decree of said circuit court, because the same erroneously directed that the said appellee recover of said appellant costs and disbursements, taxed at twenty-seven dollars and fifty-five cents ($27.55).

75 Wherefore appellant prays that the decree of said circuit court of appeals be reversed, annulled, and held for nothing, and that she may be restored to all things which she has lost by occasion of the said decree.

DRAPER, DAVIS & HOLLISTER,
Solicitors for said Appellant,
400–406 *First National Bank B'ld'g, Duluth, Minn.*

Endorsed: No. 1041. United States Supreme Court. Carrie Moss, appellant, *vs.* Richard Dowman, appellee. Assignment of errors on appeal to United States Supreme Court. Filed Sep. 1, 1898. John D. Jordan, clerk. Draper, Davis & Hollister, solicitors for appellant, 400–406 First National Bank b'ld'g. Duluth, Minn.

And on the first day of September, A. D. 1898, there was filed in the clerk's office of said circuit court of appeals a petition for appeal and order allowing same in the words and figures following:

In the United States Circuit Court of Appeals, Eighth Circuit.

CARRIE MOSS, Appellant,
against
RICHARD DOWMAN, Appellee.

The above-named appellant, Carrie Moss, conceiving herself aggrieved by the judgment and decree entered in said court in the above-entitled cause on the 27th day of June, 1898, hereby appeals from said judgment and decree to the Supreme Court of the United States and prays her appeal may be allowed, and that the transcript of the record, proceedings, and papers upon which said judgment and decree was made and entered, duly authenticated, may be sent to the Supreme Court of the United States.

Dated August 20th, 1898.

DRAPER, DAVIS & HOLLISTER,
Solicitors for Appellant.

JAS. K. REDINGTON,
W. N. DRAPER,
Of Counsel for Appellant.

76 And now, to wit, upon August 30, 1898, it is ordered that the said appeal be allowed as prayed for.

HENRY C. CALDWELL,
U. S. Circuit Judge.

Endorsed: No. 1041. United States circuit court of appeals, eighth circuit. Carrie Moss, appellant, *vs.* Richard Dowman, appellee. Petition for appeal and order allowing same. Filed Sep. 1, 1898. John D. Jordan, clerk. —— ——, solicitors for appellant.

And on the first day of September, A. D. 1898, there was filed in the clerk's office of said circuit court of appeals a supersedeas bond in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

CARRIE MOSS, Appellant,
against
RICHARD DOWMAN, Appellee.

Know all men by these presents that we, Carrie Moss, as principal, and A. L. Ordean and F. A. Patrick, both of the city of Duluth, State of Minnesota, as sureties, are held and firmly bound unto Richard Dowman in the sum of one thousand dollars ($1,000), to be paid to the said Richard Dowman; for the payment of which, well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 20th day of August, in the year of Lord one thousand eight hundred and ninety-eight.

Whereas the above-named Carrie Moss has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled suit by the United States circuit court of appeals for the eighth circuit:

Now, therefore, the condition of this obligation is such that if the above-named Carrie Moss shall prosecute said appeal to effect and answer for all damages and costs if she fail to make her plea
77 good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CARRIE MOSS. [SEAL.]
A. L. ORDEAN. [SEAL.]
F. A. PATRICK. [SEAL.]

Signed, sealed, and delivered in presence of—
CALLA M. EAMES,
SAM'L O. EAMES,
As to Miss Moss.

JOHN H. DIGHT,
H. J. GRANNIS,
As to A. L. Ordean and F. A. Patrick.

STATE OF MICHIGAN, } ss:
County of Ottawa, }

On this 20th day of August, A. D. 1898, before me, a notary public within and for said county, personally appeared Carrie Moss, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

[SEAL.] SAM'L O. EAMES,
Notary Public.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

On this 24th day of August, 1898, before me, a notary public within and for said county, personally appeared A. L. Ordean and F. A. Patrick, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[SEAL.] H. J. GRANNIS,
Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

A. L. Ordean and F. A. Patrick, being duly sworn, say each for himself that he is one of the sureties above named; that he
78 is a resident and freeholder of the State of Minnesota, and worth the amount of one thousand dollars, specified in the foregoing bond, above his debts and liabilities and exclusive of his property exempt from execution.

A. L. ORDEAN.
F. A. PATRICK.

Subscribed and sworn to before me this 24th day of August, 1898.

[SEAL.] H. J. GRANNIS,
Notary Public, St. Louis Co., Minn.

Endorsed: The within bond and sureties are satisfactory to the appellee. L. C. Harris, solicitor for appellee. No. 1041. United States circuit court of appeals, eighth circuit. Carrie Moss, appellant, against Richard Dowman, appellee. Bond of appellant. The within bond and the sureties thereon are hereby approved this 30 day of August, 1898, and I direct that said bond shall operate as a supersedeas. Henry C. Caldwell, U. S. circuit judge. Filed Sep. 1, 1898. John D. Jordan, clerk.

And on the fifth day of September, A. D. 1898, there was filed in the clerk's office of said circuit court of appeals a citation, with admission of service endorsed thereon, the original of which is hereto attached and herewith returned.

79 UNITED STATES OF AMERICA, ss:

To Richard Dowman, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein Carrie Moss is appellant and Richard Dowman is appellee, to show cause, if any there be, why the judgment and decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 30 day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

HENRY C. CALDWELL,
U. S. Circuit Judge.

[Endorsed:] 1041. United States Supreme Court. Carrie Moss, appellant, against Richard Dowman, appellee. Citation. Filed Sep. 5, 1898. John D. Jordan, clerk. —— ——, solicitors for appellant.

Due service of the within citation, by copy, is hereby admitted this 2nd day of September, 1898, at Duluth, Minn.

L. C. HARRIS,
Solicitor for the Within-named Appellee, Richard Dowman.

80 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing seventy-nine pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Carrie Moss, appellant, *vs.* Richard Dowman, appellee, No. 1041, May term, 1898, as the same remain on file and of record in my office.

I do further certify that the original citation, with the admission of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Paul, Minnesota, this eighth day of September, A. D. 1898.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[2-cent U. S. internal-revenue stamp, canceled Sep. 8, 1898. John D. Jordan.]
[2-cent U. S. internal-revenue stamp, canceled Sep. 8, 1898. John D. Jordan.]
[2-cent U. S. internal-revenue stamp, canceled Sep. 8, 1898. John D. Jordan.]
[2-cent U. S. internal-revenue stamp, canceled Sep. 8, 1898. John D. Jordan.]
[2-cent U. S. internal-revenue stamp, canceled Sep. 8, 1898. John D. Jordan.]

Endorsed on cover: Case No. 17,002. U. S. C. C. of appeals, 8th circuit. Term No., 141. Carrie Moss, appellant, *vs.* Richard Dowman. Filed September 23, 1898.

No. 141.
Brief of Redington
Filed Jan. 31, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 141.

CARRIE MOSS, Appellant,

vs.

RICHARD DOWMAN, Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

James K. Redington,
Solicitor for Appellant.

Thomas J. Davis,
Of Counsel.

Judd & Detweiler, Printers, Washington, D. C. 1-31-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 141.

CARRIE MOSS, APPELLANT,

vs.

RICHARD DOWMAN, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

STATEMENT OF FACT.

The case at bar is an appeal from a decree of the circuit court of appeals for the eighth circuit, affirming a decree of the circuit court for the district of Minnesota, which last-mentioned decree sustained a demurrer to and dismissed a bill filed by appellant, complainant below, against appellee, defendant below, the purpose and object of which was to charge the legal title to certain real estate standing in defendant with an equitable title alleged to be in complainant upon facts averred in the bill.

March 17, 1897, the United States, by its proper officers, after considerably extended litigation in the Land Department between the appellant and appellee, wherein each claimed to be entitled to a patent for the premises in dispute, then public land, issued a patent therefor to the appellee, the said tract being technically described as the S. E. ¼, sec. 22, tp. 65 N., R. 4 W., Minnesota (Transcript, p. 12).

March 23, 1897, the appellant, complainant below, filed in the circuit court of the United States for the district of Minnesota, fifth division, within which division both parties were resident and the property was situated, her bill in equity against the appellee, defendant below, predicated upon the claim that, in the issue of the patent above referred to, the Land Department had erroneously applied the law to the facts as found by said department, and that upon a proper application of the law to such facts a patent should have issued to appellant. The substantial relief prayed was: (1) that title be decreed to be in the complainant; (2) that defendant be decreed to hold the legal title as trustee for complainant; (3) that defendant be perpetually enjoined from interfering with complainant in her enjoyment of the premises, and (4) that defendant be decreed to convey the legal title to complainant. The averments of the bill, with accompanying exhibits material to the case as here presented, are substantially as follows (Transcript, pp. 1 to 36):

(*a.*) The premises in controversy were surveyed in the years 1876 and 1877; plat of survey was filed February 6, 1878, and the land thereby became and thereafter remained subject to entry under the homestead laws (Bill, par. 4; Transcript, p. 2).

(*b.*) May 7, 1890, one Robert H. Doran, in the usual and customary form, made homestead entry of the land at the proper local land office. Said entry was duly noted and entered upon all the proper and usual books and records of

the local office. In due course of business it was reported by the local officers to the General Land Office, at Washington, and therein noted and entered in and upon all the customary books and records, and, so made, noted, entered, and recorded, remained so of record from said 7th day of May, 1890, to the 24th day of October, 1890 (Bill, par. 5; Transcript, pp. 2, 3; Exhibits A and B, Transcript, pp. 15, 16; Secretary's decision, Exhibit M; Transcript, p. 24).

(*c.*) By a well-settled rule, regulation, practice, and construction of the Land Department, Doran, under his entry aforesaid, was allowed six calendar months from date thereof within which to make settlement and residence upon the land and otherwise comply with law, and, under said rule, such entry remained in full force and effect as a valid entry and appropriation from its date until canceled, upon voluntary relinquishment, October 24, 1890 (Bill, par. 6; Transcript, p. 4; Exhibit M, Transcript, p. 24).

(*d.*) October 24, 1890, within the six-month period aforesaid, Doran contracted and agreed with appellant, in consideration of the payment of $1,000, to execute and file a relinquishment to the United States of his said homestead entry. The above-named consideration was paid by appellant, and thereupon Doran executed said relinquishment and delivered it to appellant, with full authority and direction to file the same in said local office (Bill, par. 7; Transcript, pp. 4, 5; Exhibit C, p. 16).

(*e.*) October 24, 1890, appellant filed the above-described relinquishment in the local office, and the register and receiver cancelled the entry upon their records, in conformity to act of May 14, 1880, sec. 1, 21 Stat., 140 (Bill, par. 7; Transcript, p. 5).

(*f.*) October 24, 1890, aforesaid, appellant, being in all respects qualified under the law, simultaneously with the

filing of Doran's relinquishment, and as part of one and the same transaction, also filed her own application to enter said land as a homestead. This application was immediately, upon cancellation of the Doran entry, as aforesaid, and as part of one and the same transaction, allowed by the register and receiver, an entry was made and duly entered upon all the usual records, and certificate therefor in usual form was issued to complainant. The filing of the relinquishment, the cancellation of the Doran entry, the tender of the appellant's application, its allowance, the entry by appellant, the notation of such entry upon the records, and the issue of certificate therefor were all simultaneous acts and part of one and the same transaction (Bill, par. 7; Transcript, pp. 5, 6; Exhibits D, E, pp. 16, 17).

(*g.*) Within six calendar months immediately succeeding the date of her entry, appellant, at great expense and undergoing many hardships, made settlement upon the land, established residence thereon, cultivated and improved the same, and in all respects fully complied with the law, so continuing until October 22, 1892, when, after due preliminary proceedings had, she made final proof of this compliance before and to the satisfaction of the register and receiver, and tendered to said officers full payment for said land, thus becoming entitled to final certificate and patent, except for the existence of the adverse claim of defendant then pending (Bill, pars. 8, 10, 17; Transcript, pp. 6, 7, 8, 9, 10, 12).

(*h.*) September 19, 1890, while the entry of Doran still remained of record and uncanceled, the appellee Dowman made settlement upon the premises. He lived thereon continuously thereafter until November, 1890, with the exception of one absence, from October 19, 1890, to October 24, 1890, on which last-mentioned date he returned from said

absence to the land. The exact finding of the secretary upon these facts was as follows (Exhibit M, p. 27):

"Dowman * * * went on the land September 19, 1890, and began the construction of a house, which he finished October 10th following. From that time he made the land his home, actually living there continuously until November, 1890, with the exception of a trip to the county town for provisions, which he made October 19, 1890, returning October 24, 1890, the day Doran's relinquishment was filed."

The bill (par. 7, Transcript, p. 5) alleges that Doran's entry was canceled and appellant's entry was allowed "about the hour of eleven o'clock a. m. and not later than eleven o'clock and thirty minutes a. m." upon the 24th day of October, 1890. No other or different hour for the occurrence is found or fixed by the Secretary's decision. The bill further alleges (par. 9, Transcript, p. 8), *inter alia*, that appellee made *no settlement* upon the land whatever, and in no way *personally connected himself with said tract at* any hour upon said 24th day of October, 1890, and that upon the hearing appellant proved by many witnesses that appellee "was not upon said land during any portion of the twenty-fourth day of October, 1890, or, in any event, was not thereon at any hour of said day *earlier than two o'clock p. m.*" Considering, therefore, as established the fact found by the Secretary, to wit, that appellee *returned* to the land October 24, 1890, and the additional and not inconsistent facts alleged in the bill, as above recited, and we have, for the purposes of this hearing, the following established facts: First, that Doran's entry was canceled and appellant's entry was completed as early as 11.30 a. m., October 24, 1890; second, that appellee returned to the land upon this last-mentioned date; third, that this return was not earlier than 2 p. m.; fourth, that after his return he performed no specific act of settlement that day upon the land.

(*i.*) The application of supposed law to this state of fact, in the determination by the Secretary of the Interior of the rights of the litigants respectively, was as follows (Exhibit "M," Transcript, pp. 26, 29):

"The only question to determine in this case is, whether Dowman was a settler in good faith at the time Doran's relinquishment was placed on file in the local office. For, although Doran's entry was erroneously allowed, being of record it segregated the land, and therefore no right could be initiated by reason of the settlement. *But the instant the relinquishment was filed in the local office, the right of the settler on the land attached and an entry could not defeat it.*"

* * * * * *

"In view of these facts and that no evidence has been introduced which shows that Dowman's settlement was not in good faith, under the established rulings of this Department the settler Dowman's rights *attached instantly on the filing of Doran's relinquishment*, and is therefore superior to Moss's entry."

(*j.*) Upon this application of law to ascertained facts as recited, and upon no other or different facts, patent issued to appellee as hereinbefore recited (Bill, par. 15; Transcript, p. 12).

July 3, 1897, the appellee, defendant below, filed a demurrer to the foregoing recited bill (Transcript, pp. 40 to 43); October 15, 1897, said demurrer was argued and submitted (Transcript, pp. 44, 45); October 26, 1897, the court below filed its written opinion or decision upon said submission (Transcript, pp. 46 to 49), and thereupon, November 4, 1897, a decree was made and entered sustaining said demurrer and dismissing the bill of complaint (Transcript, pp. 49, 50). The learned and distinguished judge in the circuit court, in sustaining the action of the Secretary of the Interior in his application of the law to the facts found, in his opinion (Transcript, p. 48) thus, in part, announced his views:

"The filing of the relinquishment left the land open to appropriation; and the earliest appropriation of it under the land laws would attach to and hold the land. The arrangement gave the complainant opportunity to act quickly, but if the right of another attached more speedily she would fail. Dowman was then on the land, an actual resident and settler. While Doran's entry continued, Dowman could acquire no right by settlement, but the instant that entry was relinquished his right as settler attached, and no new entry, however 'simultaneous' with the relinquishment, could be thrust in between Doran's relinquishment and Dowman's rights as a settler upon the land."

December 15, 1897, appellant filed her appeal to the circuit court of appeals from the above-mentioned decree of the circuit court upon the same day she filed bond upon appeal. Citation was duly issued and served, and the cause thus came before the circuit court of appeals for review (Transcript, pp. 52 to 54).

June 27, 1898, the circuit court of appeals, upon consideration of said appeal, affirmed the decree of the circuit court (Transcript, Opinion, pp. 57 to 63; Decree, p. 63).

August 20, 1898, the appellant filed her appeal to this court. August 30, 1898, said appeal was allowed by the circuit judge (Transcript, p. 65). September 1, 1898, she filed affidavit showing the property involved to be of the value of not less than $3,000 (Transcript, pp. 63, 64). On the same day she filed bond upon appeal, which was approved by the circuit judge (Transcript, pp. 66, 67). September 5, 1898, citation, with acceptance of service, was filed (Transcript, pp. 67, 68), and the cause thus comes before this court for review.

ASSIGNMENT OF ERRORS.

The following is the assignment of errors in this court (Transcript, pp. 64, 65):

I.

In that by the record aforesaid it appears that a decree was entered in favor of said appellee and against said appellant, whereas by the law of the land the said decree ought to have been in favor of said appellant and against said appellee.

II.

In that there was error in said decree of said court of appeals in affirming the decree of the circuit court of the United States for the d strict of Minnesota, fifth division, because said circuit court in and by its decree erroneously sustained the demurrer to appellant's bill of complaint.

III.

In that there was error in affirming the decree of said circuit court, because said court ought to have overruled said demurrer.

IV.

In that there was error in affirming said decree of said circuit court in sustaining said demurrer, because the facts stated in appellant's bill of complaint justly entitled her to the relief therein prayed for.

V.

In that there was error in affirming said decree of said circuit court, because the same erroneously dismissed appellant's bill of complaint.

VI.

In that there was error in affirming said decree of said circuit court, because the same erroneously directed that the said appellee recover of said appellant costs and disbursements, taxed at twenty-seven dollars and fifty-five cents ($27.55).

BRIEF.

I.

EO INSTANTI ATTACHMENT OF SETTLER'S RIGHT.

The theory upon which the decision in the court below proceeds is that a settlement, followed by residence, made upon appropriated or reserved lands, although originally unlawful and a trespass, will, nevertheless, upon cancellation of the appropriation or restoration of the land, become thereby instantly valid, so as to exclude the entry of a third party made simultaneously with the release of the land.

We submit with great deference that this is a misconception of the law; that no settlement upon appropriated land can give a settler thus violating the law precedence over a third party applying the instant of cancellation, who is in all respects within the law, and that no decision ever made, either in the department or the courts, is authority for such a position.

We submit that the law does not permit the wrong-doer to take advantage of his own misdeed to work a forfeiture of property rights in his law-abiding neighbor; that, as against such innocent third person, no equity ever arose or could ever arise upon an unlawful act, and that no such claim is entitled to recognition except upon proof of some distinct act of personal settlement subsequent to the restoration of the land.

We concede, at the outset, that both parties to the case at bar are concluded as to the facts found by the Secretary of the Interior in his decision of December 19, 1894, Exhibit M. The general proposition that the courts will not re-examine questions of fact litigated before executive officers in matters confided by law to their jurisdiction, and by such officers decided, is settled by authority.

It is equally well settled, and by the same line of authorities, that whenever, upon facts so found, the law has been misconstrued or misapplied, the courts will, in a proper proceeding, grant relief to the party aggrieved. All questions of fact presented and decided in a controverted proceeding are concluded by the departmental decision and are binding upon the court; but where the officers of the Land Department have, by mistake of law, given to one man the land which, upon the facts found, belongs to another, equity will grant relief by putting the title where of right it ought to be.

Johnson *vs.* Towsley, 13 Wal., 72.
Bagnell *vs.* Broderick, 13 Pet., 436.
Warren *vs.* Van Brunt, 19 Wal., 646.
Shepley *vs.* Cowen, 91 U. S., 330.
Moore *vs.* Robbins, 96 *ib.*, 530.
Quinby *vs.* Conlan, 104 *ib.*, 420.
St. Louis Smelting Co. *vs.* Kemp, *ib.*, 636.
United States *vs.* Minor, 114 *ib.*, 233.
Lee *vs.* Johnson, 116 *ib.*, 48.
Sparks *vs.* Pierce, 115 *ib.*, 408.
Bowhall *vs.* Dilla, 114 *ib.*, 47.

The question thus arises whether, upon the facts found by the Secretary's decision and other not inconsistent facts well pleaded in the bill, the patent to appellee was properly or improperly issued under the law. If the latter, the decree below must be reversed.

The important, material facts to be, in this connection, carefully borne in mind are. (1) That at the date of appellee's settlement upon the land the tract was covered by the valid subsisting homestead entry of Doran; (2) that simultaneously with the relinquishment of Doran, and as part of one and the same act, appellant made homestead entry of the tract; (3) that at the time of such relinquishment and entry appellee was not upon the land and did not there-

after go thereon until several hours later ; (4) that at no time during any portion of the day upon which such relinquishment and entry were made did appellee perform any act of settlement upon the tract. Under these circumstances we submit that the settlement of appellee made during the reservation of the land gave him no right which, upon cancellation of the Doran entry, could *eo instanti* attach to the exclusion of the entry of appellant.

It is well settled by a long line of adjudicated cases, both in the Land Department and the courts, that an entry of public lands under any of the general laws for the disposition of the public domain instantly creates in respect thereto an appropriation thereof reserving and excepting the same from any subsequent settlement and any further or other disposition so long as said entry remains uncanceled upon the records of the Government, and that this proposition is true, irrespective of any question affecting the regularity or legality of the entry.

A *prima facie* valid entry of record operates to appropriate the land covered thereby and to reserve it pending the existence of such prior entry from all subsequent disposition.

Davis *vs.* Crans, 11 C. L. O., 22.
Graham *vs.* H. & D. R. R. Co., 1 L. D., 362.
Whitney *vs.* Maxwell, 2 *ib.*, 98.
Henry Cliff, 3 *ib.*, 216.
Ernest Trelut, *ib.*, 228.
Simpson *vs.* Foley, 4 *ib.*, 21.
So. Mo. R. R. Co. *vs.* Bottomly, *ib.*, 208–210.
Hugh Barclay, *ib.*, 390–392.
Legan *vs.* Thomas *et al.*, *ib.*, 441.
Pfaff *vs.* Williams *et al.*, *ib.*, 455–457.
Milton Townsite *vs* Gann, *ib.*, 584–586.
Schrotberger *vs.* Arnold, 6 *ib.*, 425.
Mudgett *vs.* D. & S. C. R. R. Co., 8 *ib.*, 243.
James A. Forward, *ib.*, 528.
Allen *vs.* Curtius, 7 L. D., 444.
Ludwig May, 13 *ib.*, 297.

An allowance of an entry appropriates and segregates the land, even though said entry by mistake of the proper officers is not made matter of record.

Linville *vs.* Clearwaters *et al.*, 11 L. D., 356.
Henry Milne, 14 *ib.*, 242.

Even where such an entry was made by an alien, the department has held that the entry while of record worked an appropriation of the land.

Leary *vs.* Manual, 12 L. D., 345.

The same rule has been applied in repeated instances to invalid entries, voidable only.

St. Paul M. & M. R. R. Co. *vs.* Forseth, 3 L. D., 446.
St. Paul M. & M. R. R. Co. *vs.* Leech, *ib.*, 506.
Hollants *vs.* Sullivan, 5 *ib.*, 115.

To precisely the same effect are all the adjudications of the Federal courts from the earliest date.

Chotard *vs.* Pope, 12 Wheat., 586, 588.
Wilcox *vs.* Jackson, 13 Pet., 498.
Bagnell *vs.* Broderick, 13 Pet., 436.
Cunningham *vs.* Ashley, 14 How., 387.
Witherspoon *vs.* Duncan, 4 Wall., 218.
Johnson *vs.* Towsley, 13 *ib.*, 73, 75.
Railroad *vs.* Whitney, 132 U. S., 357.
Bardon *vs.* N. P. R. R. Co., 145 U. S., 538.
McIntyre *vs.* Roeschlaub *et al.*, 37 Fed. R., 566.
Hartmann *vs.* Warren, 76 Fed. Rep., 157.

It necessarily follows, in the case at bar, that the Doran entry, so long as it remained uncanceled, removed the land from any settlement by appellee; that when the latter made his pretended settlement and thereafter continued a residence upon the tract he was simply a trespasser, and that

at no time prior to the appropriation of the land by the entry of appellant could he have acquired any right whatever in or to the same.

We submit that it is equally clear, both upon reason and authority, that after the determination of the appropriation by the Doran entry the appellee, especially as against the entry of appellant, could acquire no valid settlement claim except by some new and distinct act of settlement, and that as no such act antedated the entry of appellant, the latter claim is paramount.

An examination of the departmental decisions upon this question, from the earliest reported cases, will show:

First. That from 1859 to 1885, a period of over twenty-six years, an uninterrupted chain of cases held that no right upon cancellation of an entry inured by reason of a settlement made during its existence; that to hold otherwise would be to enable a trespasser to benefit by his own wrong, and that any such pretended claim was invalid and of no effect against another entry made at the time of cancellation.

Gilman *vs.* Gray, Lester's L. L., vol. 1, pp. 407, 408.
Beebe *vs.* Hurlburt, Copp's L. L. (1875), 315.
Crystal *vs.* Dahl, *ib.*, 316.
Eno *vs.* McDonald, *ib.*, 317.
Peterson *vs.* Kitchen, 2 C. L. O., p. 181.
Porter *vs.* Johnson, 1 Copp's L. L. (1882), 544.
Dietrick *vs.* Bissey, *ib.*, 546.
Timmons *vs.* Gleason, *ib.*, 551.
Corrigan *vs.* Ryan, *ib.*, 542.
Tilton *vs.* Price, 4 L. D., 123.

It will thus be observed that the principle for which we are contending was specifically announced as the law of the land by Secretary Thompson as early as 1859, and from that date down to the year 1885, a period of twenty-six

years, that principle prevailed as the sole rule of decision in the Land Department. During all of this time there is no break whatever in the line of authority which declares that no right can be initiated upon appropriated or reserved lands by intrusion thereon before restoration to market. This series of decisions is as clear a line of well-established precedents declaring a settled doctrine as can be found in the whole history of land jurisprudence. It is precisely such a line of authorities as calls into operation the rule of *stare decisis*. We submit with the utmost confidence that any executive officer who, in 1885, had undertaken to hold otherwise than in accordance with this principle would have clearly and properly subjected himself to the charge of gross violation of established law and precedent.

Second. That from about the year 1885 to the present date, a period of twelve years, there has been a somewhat extended line of cases which may be divided or classified, according to their tenor and effect, as follows:

(*a.*) Cases where, as in Peterson *vs.* Kitchen, *supra*, the claim of a settler was recognized who had entered upon land during its reservation, not of his own wrong, but by permission of the then claimant.

Houf *vs.* Gilbert, 5 L. D., 238.

(*b.*) Where both parties had settled during the appropriation and were in equal degrees trespassers and in default of law, the earliest settler being admitted upon the theory that legal rights, or want thereof, being equal, equities as between the two should prevail.

McAvinney *vs.* McNamara, 3 L. D., 552.
Geer *vs.* Farrington, 4 L. D., 410.
Gudmundson *vs.* Morgan, 5 L. D., 147.
Neilson *vs.* Shaw, 5 L. D., 358, 387.
Tarr *vs.* Burnham, 6 L. D., 709.

Kruger *vs.* Dumbolton, 7 L. D., 212, 214, 215.
Rockwell *vs.* Crockett, 9 L. D., 89.
Hall *vs.* Levy, 11 L. D., 284.
Etnier *vs.* Zook, 11 L. D., 452, 454, 455.
Smith *vs.* Place, 13 L. D., 214.
McInnis *vs.* Cotter, 15 L. D., 583.
McGowan *vs.* McCann, 15 L. D., 542.
Lough *vs.* Ogden, 17 L. D., 171.
Davidson *vs.* Gelinas *et al.*, 18 L. D., 392.
Settoon *vs.* Tschirn, 19 L. D., 1.
McMichael *vs.* Murphy, 20 L. D., 147, 150.
Hunter *vs.* Blodgett, *ib.*, 452, 454.
Spring *vs.* Reinbold *et al.*, 25 *ib.*, 37.
Giles *vs.* Troop, *ib.*, 448.

(*c.*) Cases where a settler was actually personally present upon the land, having and proving some specific connection therewith at the very instant of cancellation, in the nature of a settlement, in which cases, by a stretch of judicial interpretation, in our judgment neither well founded nor wise, the settler is supposed, immediately upon cancellation, to be purged of his previous illegal status and instantly habilitated with the garb of an honest settler.

McAvinney *vs.* McNamara, 3 L. D., 552.
Millis *vs.* Burge, 4 L. D., 446.
Wiley *vs.* Raymond, 6 L. D., 246–248, 249.

(*d.*) A list of five very recent cases in which a settlement made during an appropriation has been held good as against a filing or application tendered simultaneously with the relinquishment or cancellation; of which cases, however, only *two* stand upon all fours with the case at bar, and in respect

to which two one is clearly to be distinguished from that here under consideration.

Pool *vs.* Moloughney, 11 L. D., 197 (Assistant Secretary Chandler, Aug. 20, 1890).

Stone *vs.* Cowles, 13 L. D., 192 (Assistant Secretary Chandler, Aug. 24, 1881); Review, 14 L. D., 90.

Zaspell *vs.* Nolan, 13 L. D., 148 (Assistant Secretary Chandler, Aug. 11, 1891).

Fosgate *vs.* Bell, 14 L. D., 439 (Assistant Secretary Chandler, April 30, 1889).

Blauvelt *vs.* Masden, 18 L. D., 538 (Secretary Smith, June 18, 1894).

In two of these cases the application to enter upon cancellation was tendered by the very person who relinquished the prior entry while in default of law, and who was, of course, not an innocent third party applying at the instant of relinquishment by a stranger.

Zaspell *vs.* Nolan, 13 L. D., 148.

Fosgate *vs.* Bell, 14 *ib.*, 439.

In another of said cases the settler had originally entered not of his own wrong, but by permission, through *mesne* conveyances, of the owner of the canceled entry, and, in addition, as would appear from the decision on review, was considered as being actually personally present upon the land at the instant of cancellation.

Stone *vs.* Cowles, 13 L. D., 192; 14 *ib.*, 90.

The case of Pool *vs.* Moloughney (*supra*), decided by Mr. Assistant Secretary Chandler, August 20, 1890, is the first case ever reported, standing upon all fours with that at bar, in which the so-called *eo instanti* doctrine was applied.

Up to that point we assert with positive assurance that no decision can be found arising upon the same state of facts and deciding against the principle for which we are contend-

ing. We assert with equal positiveness that this decision was made upon an entire misconception of the authorities upon which it purports to be based; that it is not expressive of the law as it then existed, even under authorities which it cites, and that it has never since been followed in any case presenting the same facts.

In this particular case the land in controversy was withdrawn for the benefit of the Atlantic and Pacific railroad, and this withdrawal was formally released and extinguished May 24, 1886, on which last-mentioned date, at exactly at what relative time is not shown, the premises were entered by Moloughney as a soldier's homestead. July 23, 1886, Pool filed a homestead application, alleging settlement May 14, 1886. The testimony showed that Pool had settled upon the land during the reservation, and was an actual resident thereon, with valuable improvements, at the date the land was restored to market.

Admitting, for the sake of argument, that Moloughney's entry was made simultaneously with the release of the reservation (which fact, however, does not appear), it would then follow that the facts in this particular case are on all fours with that at bar. The decision of the case sustains the right of Pool in these words:

"The department has repeatedly held that where land had been covered by a homestead or other entry that was afterwards canceled, the settlement upon the tract prior to such cancellation, especially if attended by the possession and ownership of valuable improvements, whether made or purchased, was sufficient to constitute a legal claim that would attach to the land the instant it became again a part of the public domain."

With great respect for the learned Assistant Secretary who signed this decision, we submit, with absolute confidence, that the above quotation is an entire misconception and misstatement of the law as it existed at that date and as it now exists. The doctrine said to have been repeatedly held

by the department had not, as we have already shown, ever been announced, in any decision standing upon the same facts as the case then before the department or as appear in the case at bar. The Assistant Secretary simply fell into grievous error in failing to observe and note the distinction between the previously adjudicated cases and the case then before him, in respect to the situation of the parties. Seven cases are cited in this decision as authority for the position taken. Six of these cases are the identical authorities which we have previously herein classified and shown not to be authority for the position taken, and the seventh case, that of Cathran *vs.* Davis (5 L. D., 249), cannot possibly, by the wildest imagination, be considered an authority upon either side of the proposition. Under these circumstances we are entirely within the limit of legitimate contention when we assert that this decision, the only one extant which actually reaches our case, is not even persuasive authority, and if it were to be considered as an authority, it would simply be one case as against the years of adjudication which we have previously shown.

The remaining case of Blauvelt *vs.* Masden (*supra*) decided by Secretary Smith, June 18, 1894, is of even less persuasive authority. In this case it appears that the premises in controversy had been included in a timber-culture entry which was relinquished to the United States March 21, 1888. On the day of this relinquishment Masden appears to have settled upon the land, at what precise hour does not appear, and subsequently upon the same day filed declaratory statement. Blauvelt alleged settlement in February, 1885, during the continuance of the reservation. From this statement of facts it will be seen that the question here arose between a claimant who must have made a separate and independent act of settlement subsequently to the cancellation, and a contestant who was upon the land necessarily at a point of time subsequent to the cancellation and prior to Masden's settlement. In other words, it was a case

where an independent act of settlement was necessarily involved in favor of Blauvelt, after the act of restoration and prior to the settlement of Masden. Each party was asserting title under a settlement, and the successful party was entitled to a decision without any reference whatever to the question of law which we have now under consideration. Under such circumstances it is obvious that the case is to be distinguished from the one at bar, and that whatever expressions may be found therein upon the *eo instanti* doctrine are not to be taken as controlling authority.

(*c*.) To the foregoing it should be added that the later decision by Mr. Secretary Smith, made February 25, 1895, and cited *supra*, held in effect that the so-called *eo instanti* doctrine applies only in a case where the settler is actually upon the land at the very instant of cancellation.

McMichael *vs.* Murphy, 20 L. D., 147, 150.

It follows that the case at bar is to be disposed of, so far as departmental authority is concerned, upon an uninterrupted line of decisions extending over a period of twenty-six years, and acquiesced in or announced by every Secretary from the administration of Secretary Thompson, in 1859, to that of Secretary Lamar, in 1885, opposed only by the single decision of Assistant Secretary Chandler, in 1890, in the case of Pool *vs.* Moloughney. Under such circumstances, and standing upon the authority of departmental decisions alone, we submit that the appellee, by his unlawful and illegal intrusion upon the premises in controversy, obtained no right whatever as against the appellant under her entry made simultaneous with the cancellation.

We have no reference to any case where the precise question at bar, arising upon identical facts, has arisen and been decided in the Federal courts; but the underlying principle leading to the conclusion for which we contend is necessarily found in many cases fairly illustrated by those

hereinbefore cited upon the question of appropriation by entry and its effect, and has been recently announced by the Supreme Court in a case upon which we rely as practically controlling and settling the pending controversy.

Wood *vs.* Beach, 156 U. S., 549.

From the foregoing considerations, it necessarily results that, inasmuch as the outstanding legal title in the appellee is based upon no claim of right prior to appellant's entry except a settlement made and residence established and continued while the land was covered by an uncanceled homestead entry, with no subsequent act of settlement alleged or proven, such legal title is invalid as against complainant, and this appearing upon the face of the bill, the demurrer must be sustained.

II.

NO CULTIVATION SHOWN BY APPELLEE.

The bill of complaint (par. 18; Transcript, p. 13) avers the finding of certain facts by the Secretary relative to defendant's supposed compliance with law; alleges that these were the only facts so found, and shows that the Secretary made no finding whatever that the defendant at any time cultivated any portion of the land. As cultivation is one of the requisites of a valid homestead claim, and essential to be proved before patent issues, and as want of this essential prerequisite appears upon the face of the bill, the demurrer should for this reason have been overruled.

III.

FACTS AVERRED SHOW NO RIGHT IN APPELLEE.

The bill of complaint (paragraphs 18 and 19; Transcript, pp. 13 and 14) shows the facts upon which the title of defendant was founded. Whether in view of these facts the

defendant was entitled to a patent is a question of law ; and if, as we claim, such facts show the defendant not to have been so entitled, then the Secretary proceeded in error of law, and as this fact appears upon the face of the bill, the demurrer should for this reason also be overruled.

IV.

Upon the foregoing consideration we submit that the decree in the court below was entered in error, and that the same should be here reversed.

JAMES K. REDINGTON,
Solicitor for Appellant.

THOMAS J. DAVIS, *Of Counsel.*

No. 141.

Brief of Towne for Appellee.

SUPREME COURT OF THE UNITED STATES.

Filed Nov. 27, 1899.

OCTOBER TERM, 1899.

SUPREME COURT U.S.
FILED
NOV 27 1899
JAMES H. MCKENNEY,
Clerk

No. 141.

CARRIE MOSS, APPELLANT,

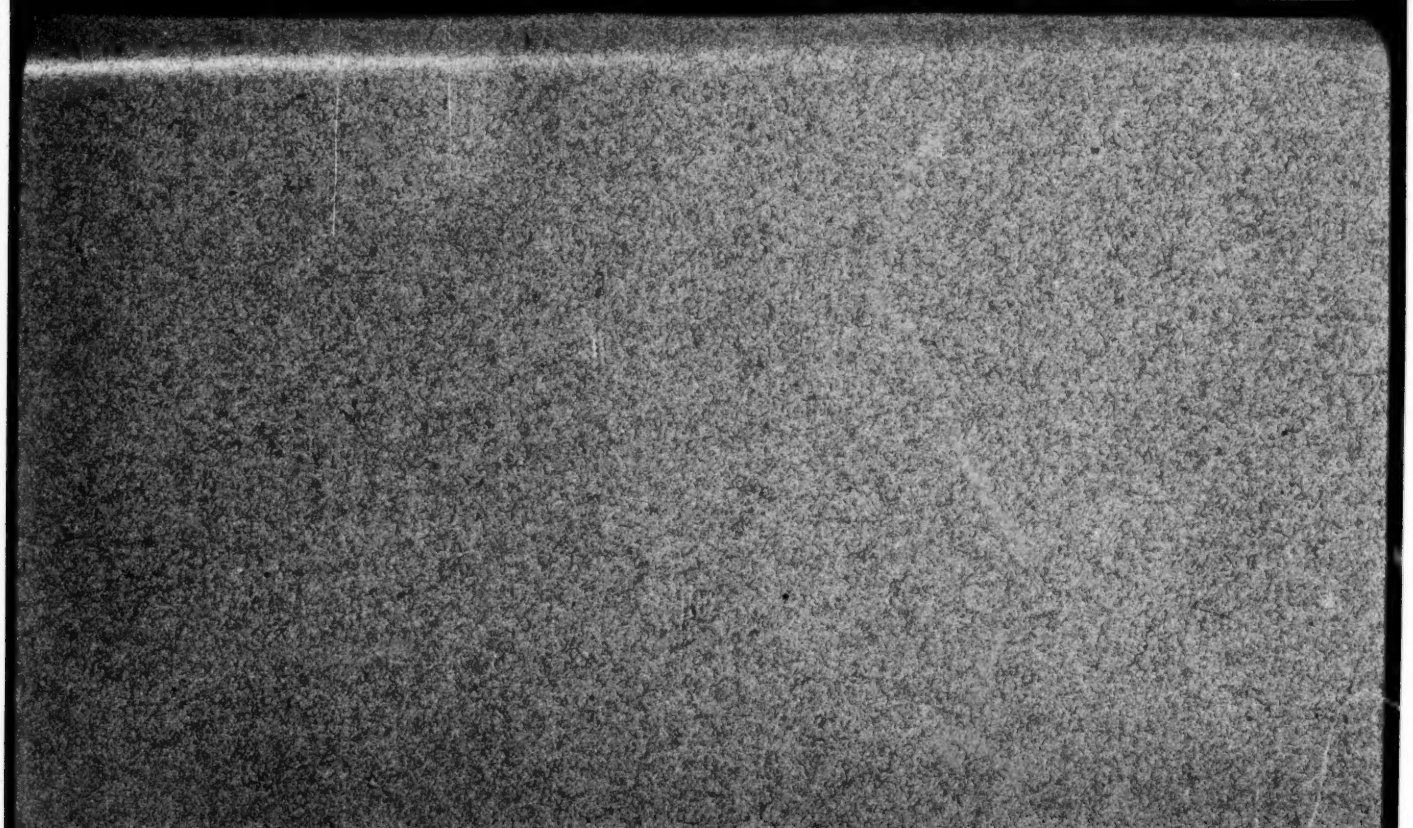
vs.

RICHARD DOWMAN, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEE.

CHARLES A. TOWNE,
Counsel for Appellee.



SUPREME COURT OF THE UNITED STATES.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEE.

On May 7, 1890, one Robert H. Doran made homestead entry on the land in controversy, but did not at the time of entry or at any time afterwards make settlement upon the land or place any improvements thereon.

On October 24, 1890, the appellant induced the said Doran to execute a relinquishment of his homestead entry to the government, and on the same day the appellant filed said relinquishment and immediately thereafter made application to enter the said land as a homestead on her own behalf, which application was accepted by the officers of the local land office.

On the 19th day of September, 1890, a little more than a month before the appellant filed on said land, the appellee, Richard Dowman, settled upon said land, and on the 18th day of November, 1890, the appellee made application to enter said land as a homestead.

As this application was subsequent to the entry of the appellant the local officers neither allowed or rejected the application of the appellee, but on the 3rd. day of February, 1892, the Commissioner

of the General Land Office directed the local officers to order a hearing before themselves to determine the rights of the respective parties.

Under this state of facts it is perfectly apparent that the sole question for determination by the land department was whether the appellant or the appellee had the prior right of entry on the 24th. day of October, 1890, the day on which appellant made her filing.

The appellant claims that she was entitled to preference by reason of the purchase of the relinquishment from Doran and her filing made immediately upon the acceptance of said relinquishment.

The appellee claims that he was entitled to the preference for the reason that he settled upon the land more than a month before appellee made her entry; and while he does not claim that he could initiate any right to the land itself as long as it was covered by the homestead entry of Doran, he does contend that as soon as Doran's relinquishment was accepted, the land again became a part of the public domain, and that as he was a settler upon the land at that time his right to it attached instantly.

The position taken by the appellee has been upheld by the Secretary of the Interior, by the Circuit Court for Minnesota and by the Circuit Court of Appeals for the Eighth Circuit and the case is now brought before this court for final determination by Moss, the complainant and appellant.

At the time of writing this brief we have not received a copy of appellant's brief, and our references to the positions taken by counsel for appellant, therefore, necessarily refer to the brief used by him before the Court of Appeals.

The errors alleged in the bill of complaint are:

1. That appellee's residence and improvements were insufficient.

2. That there is no specific and affirmative finding of fact that appellee ever cultivated any portion of said land.

3. That there is no specific and affirmative finding of fact that appellee was actually upon the land in question at the instant that appellant offered her filing.

4. That conceding that appellee was on the land in question at the instant appellant offered her filing, it was error to hold that appellee had the prior right of entry, for the reason that appellee could initiate no right to the land while it was covered by Doran's entry, and that appellant having offered her filing at the same time

Doran's relinquishment was offered, that the two acts were simultaneous, and that, therefore, her right to the land attached instantly upon the filing of Doran's relinquishment.

The first question that presents itself for consideration is, to what extent will the courts review the decisions of the Secretary of the Interior.

It has been uniformly held that the land department is constituted a special tribunal, with judicial powers, to consider and determine all questions of fact relating to the settlement and acquirement of public lands, and that its decisions on all such questions of fact are final and conclusive and cannot be reviewed in either a court of law or of equity.

Lee vs Johnson, 116 U. S. 48. 29-570.

Quinby vs. Conlan, 104 U. S. 420, 26-802.

Vance vs. Burbank, 101 U. S. 514, 25-930.

Shepley vs. Cowan, 91 U. S. 330, 23-427.

The second reference is to the L. C. P. Co. Edition.

Of the four errors which appellant alleges in respect to the decision of the Secretary, three relate to the residence, improvement and cultivation made by the appellee, and to the question as to whether the appellee was actually upon the land at the instant appellant offered her filing.

These are all clearly questions of fact, and have frequently been held to be so by the courts.

Vance vs. Burbank, 101 U. S. 514, 25-930.

Shepley vs. Cowan, 91 U. S. 330, 23-427.

Quinby vs. Conlan, 104 U. S. 420, 26-802.

Lee vs. Johnson, 116 *U. S.* 48, 29-571.

Counsel for appellant in his brief admits the abstract proposition that the decision of the Secretary on questions of fact is conclusive, and we do not believe that he will contend that the questions of residence, improvements, cultivation and the question as to whether or not the appellee was actually upon the land at the instant appellant offered her filing are not questions of fact and controlled by the cases cited above.

But he seeks to avoid the effect of these decisions by alleging that the Secretary failed to make any specific and affirmative findings on these questions.

In paragraph 18 of the bill, Record page 13, complainant, referring to the decision of the Secretary, says: "And there is no finding of fact whatever therein, that the defendant at any time evercultivated any portion of the tract."

The best answer to this allegation is, that the question of cultivation was not an issue in the matter that was before the Secretary. The only question before the Secretary for determination was, whether appellant or appellee had the prior right to enter the land in question on the 24th day of October, 1890.

The matter in dispute between the parties did not arise on an offer of final proof, but on a contest initiated by appellee who claimed that he had settled on the land before appellant made her filing, and was entitled, therefore, to the prior right of entry.

The only question raised by this contest was as to the relative rights of the parties on October 24, 1890, and the only question of fact that could be involved in a determination of this question was whether the defendant had made actual settlement prior to that time. That this was the only question in the case is clearly shown by the opinion of the Commissioner, Record p. 21, as follows: "From an examination of the Record I find that Moss made her entry October 24, 1890; with her said application of entry was filed the relinquishment of one Doran, who had a prior entry thereon. Dowman applied to entry November 18, 1890, alleging settlement September 19, 1890. Said application was rejected for the reason that the land was embraced in the entry of said Moss. Said Dowman therefore filed an affidavit of contest against said entry of Moss, alleging that he was a settler upon said land in good faith, when Doran's entry was relinquished, and the entry of Moss allowed."

The Secretary was of the opinion that this was the only question in the case, for in his decision, Record p. 26, he says: "The only question to determine in this case is, whether Dowman was a settler in good faith at the time Doran's relinquishment was placed on file in the local office."

The question of cultivation could only arise on an offer of final proof, or on a contest specially instituted for failure to comply with the law as to cultivation.

The next allegation of error is stated in par. 12 of the bill, Record, p. 11, as follows: "Your orator avers and shows that the Secretary in his said decision did not find as a matter of fact, that defendant was upon said land upon the the 24th day of October,

1890, at the time of the entry by your orator, or that at any time upon said day, defendant made any act of settlement thereon."

Appellant does not say that the Secretary found that Dowman was *not* upon the land, but that he did not specifically and affirmatively find that that Dowman *was* on the land.

We are not aware of any provision of law, nor has appellant cited us to any, that makes it incumbent upon the Secretary to make specific findings of fact upon each material question of fact involved in a case presented to him for determination.

The Secretary stands in the same relation to the Land Department that an appellate court does to a *nisi prius* court; he is the final and supreme authority in that department, and it is customary with secretaries, as it is with appellate courts, to deliver their decisions in the form of general conclusions, rather than in the form of specific findings of fact and conclusions of law.

Suppose that the evidence on all material points in the case had been overwhelmingly in favor of defendant Dowman's contention, and the Secretary's decision had been as follows: "I have examined the record in this case and have decided that Dowman's entry should be allowed."

Such a decision would certainly have settled the rights of the parties so far as the Land Department was concerned, and would have been fully justified by the evidence. And yet, if appellant's theory is correct, she could have begun a suit in equity, overturned the decision of the Secretary and recovered the land, because the Secretary in his decision did not make specific findings of fact in favor of the party for whom he decided. In other words, that the appellee must suffer, not because of the insufficiency of his proof, not because he failed to comply with the law in all respects, but because of the failure of the Secretary to announce his decision in a particular way, a matter over which the appellee had absolutely no control whatever.

Referring to this point, counsel, on page 7 of his brief says: "We have, for the purposes of this hearing, the following established facts: first, that Doran's entry was cancelled and complainant's entry was completed as early as 11:30 a. m., October 24, 1890; second, that Dowman returned to the land on this last mentioned date; third, that his return was not earlier than 2 p. m."

Taking the foregoing as a premise, counsel deduces the following argument: first, that as a matter of law it was necessary for Dowman to have been in the actual physical possession of the land at the instant Moss offered her filing; second, that as Moss offered

her filing as early as 11:30 a. m., and as Dowman did not reach the land until 2. p. m., that therefore the Secretary erred in allowing Dowman's filing.

But counsel's statement of the facts does not agree with the record. On page 27 of the Record, the Secretary says: "But, the evidence does not not show, first, the exact time when the relinquishment of Doran was filed. Miss Moss in her testimony admits that she did not know the exact time when it was filed, and there seems to be considerable doubt on this point. Second. The evidence does not show that Dowman was not in the limits of his claim at the time it is presumed that the relinquishment was filed."

From this it clearly appears that the Secretary did not find that Moss made her filing before Dowman returned to the land.

Conceding that Dowman did not return to the land until a short time after Moss filed, we think the Secretary is clearly within the authorities when he says, Record, p. 26: "It is probably established doctrine in this department that has been upheld by a long line of decisions that are too numerous to cite, that necessary absences from a man's claim do not break the continuity of settlement or residence within the intention of the land laws, but that the settler, though actually absent, is constructively present upon the land to all intents and purposes. Therefore, even had Dowman not been actually within the limits of his claim at the instant the relinquishment of Doran was filed in the land office at Duluth, he was constructively upon the land, as that was his only home and his right attached before that of Moss' entry, just as surely as if he had been within the walls of his cabin. To hold otherwise would be both unreasonable and trifling; and therefore would not be sanctioned by law."

We submit, therefore, that the mere failure of the Secretary to make specific and affirmative findings upon all questions involved is not sufficient grounds upon which to predicate error.

It will be presumed that the decision of the Secretary is right unless it affirmatively appears upon the face of the proceedings that it is wrong.

As long as he is acting within the scope of his authority, a decision of the Secretary of the Interior stands upon the same basis as the judgment of a court at law, and every presumption will be indulged in to uphold it rather than to overthrow it.

To justify a court in overturning a decision of the Secretary the error must be clear and manifest, not possible or contingent.

Says the court in Quinby vs. Conlan, 104 U. S. 420, 26-802: "And we may also add in this connection, that the misconstruction of the law by the officers of the department, must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them."

And in Marquez vs. Frisbie, 101 U. S. 473, 25-801, the court says: "The language of this court in Moore vs. Robbins, cited above, is that equity will interfere when it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another."

"The meaning of this, and the sound principle, is, that when it is a mixed question of law and fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. But if it can be made entirely plain to a court of equity, that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief."

We come now to a consideration of the only question of law raised by the bill, and the only question that can be considered and passed upon by this court.

That question is this: Conceding that Dowman was on the land in dispute as a settler at the moment Doran's relinquishment was filed, was he or appellant entitled to the prior right of entry?

This precise question has been before the Land Department on numerous occasions, but so far as we have been able to discover, has never been presented to, or passed upon by the courts, until this case arose.

In the Land Department there are two lines of decision on this question. Down to about 1883 the department held that when a piece of government land was covered by an entry and the relinquishment of an entryman was purchased by another, that if the purchaser offered to file at the same time he offered the relinquishment, the filing of the relinquishment and the filing of the entryman were simultaneous and one and the same act, and the new entrymen was given the preference over one who had settled on the land while it was covered by a filing. This has come to be known as the "simultaneous" doctrine.

From about 1884 down to the present time, the department has accorded the preference to the settler, on the ground that the moment the relinquishment is filed the land becomes again a part of the public domain and open to settlement, and that the right of

the settler, by reason of his occupation, attaches *eo instanti* upon the filing of the relinquishment. This has come to be known as the "*eo instanti*" doctrine.

This latter doctrine is upheld by the following decisions, as well as numerous others that might be cited:

Millis vs. Burge, 4 *L. D.* 446.
Wiley vs. Raymond, 6 *L. D.* 246.
Poole vs. Moloughney, 11 *L. D.* 197.
Zaspell vs. Nolan, 13 *L. D.* 148.
Stone vs. Cowles, 13 *L. D.* 193.
Fosgate vs. Blel, 14 *L. D.* 90.
Blauvelt vs. Masden, 18 *L. D.* 539.
Dowman vs. Moss, 19 *L. D.* 526.

See also the decisions of the United States Circuit Court in this case, Record, p. 46; and the decision of the Court of Appeals, Record, p. 57.

As the decisions of the Land Department on questions of law are not binding on the courts, we shall consider this question from the standpoint of reason, and shall attempt to show that the later decisions of the department are based upon better reasoning than the earlier ones are.

Appellant's contention is that Doran's entry segregated the land from the mass of public lands, and that while this entry remained in force no rights could be obtained by another settling upon the lands, and for the pusposes of this argument this may be conceded.

Appellee's contention is, that while it may be true that he could not initiate any right to the land so long as it was covered by a prior homestead entry, yet the moment the entry was relinquished it again became a part of the public domain and was open to the first settler or the first applicant.

But, appellant will reply, the relinquishment by Doran and the filing by Moss were simultaneous acts; there was no interim between, no lapse of time within which Dowman's rights as a settler could attach, and therefore Moss's entry should have been allowed.

But the acceptance of the relinquishment and the allowance of Moss's entry could not, in law, have been simultaneous acts.

Appellant has attempted to foreclose this question by alleging

that the land officers received and accepted the relinquishment and allowed the filing at the same instant of time.

This is a very convenient and comfortable doctrine for appellant to adopt, and it is absolutely essential for her to maintain and establish it in order to prevail in this case.

But we deny the right or authority of appellant to settle the rights of the parties to this litigation by the adoption and appropriation of the term "simultaneous," and we deny that the land officers have the power to give any legal effect to a transaction of this kind by any mere physical acts of their own.

The device is a cunning one, but it is more ingenious than ingenuous.

The question as to whether or not the acceptance of Doran's relinquishment and the allowance of Moss' entry were simultaneous acts is a question of law and not of fact.

If Congress had given the right to an entryman on government land to transfer and assign or relinquish his inchoate right to the land to another, then, undoubtedly, the divestment of the right of the entryman and the investment of the right in the person to whom he assigned or relinquished, would be simultaneous.

But Congress has given no such right. The entryman may sell and transfer his rights to any improvements he may have on the land, but he has no power whatever to control the disposition of the land itself. That right is retained exclusively by the government, and as a matter of fact when an entryman relinquishes his right to a piece of public land the relinquishment runs to the United States.

The General Land Office Circular for 1892, page 74, provides: "Relinquishments run to the United States alone, and no person obtains any right to the land by a mere purchase of the relinquishment of a filing or entry."

Judge Lochren, Record, page 48, speaking of the effect of the relinquishment, says:

"I think the secretary was clearly right. The idea that Doran by handing his instrument of relinquishment to the complainant for filing, even though for a large consideration, could invest the complainant with his rights or with any rights, is inadmissible. The filing of the relinquishment left the land open to appropriation; and the earliest appropriation of it under the land laws would attach to and hold the land. The arrangement gave the complainant opportunity to act quickly, but if the right of another attached more speedily she would fail. Dowman was then on the

land, an actual resident and settler. While Doran's entry continued Dowman could acquire no right by settlement, but the instant that entry was relinquished his right as settler attached, and no new entry however "simultaneous" with the relinquishment could be thrust in between Doran's relinquishment and Dowman's rights as a settler upon the land."

A very simple illustration will show the absurdity of the "simultaneous" doctrine contended for by appellant.

A, who is the owner of a piece of land, transfers the same to B, who in turn instantly transfers the same to C.

If the doctrine contended for by appellant is correct, then the divestment of title in A and the investment of title in C were simultaneous and occured at the same instant.

But if the divestment of title in A and the investment of title in C occurred at the same instant then there was no instant of time for the title to have rested in B, and there must have been such an instant of time, however infinitesimally small, for C obtains his title through B, or not at all, and if the title never rested in B, even for an instant, then C never could have obtained the title.

The illustration of the Circuit Court in this case is probably even better than the above. Judge Lochren, Record, page 48, says: "I will not dwell upon the argument urged by the complainant based on the alleged fact of the "simultaneous" delivery to and acceptance by the officers of the land office of Doran's relinquishment and complainant's application to enter. No two acts could be so simultaneous as to shut out the effect of a fact existing at the time. To illustrate. Suppose A for a valuable consideration paid him by B sells to B a tract of land, there being at the time a judgment against B docketed in the county. Before receiving his deed from A suppose B sells the same land to C, and that B makes his deed to C, handing it to A, with directions to deliver it to C, and also deliver A's deed of the land to B at the same time to C, and that both deeds are at the same time and in one envelope delivered by A to C, who passes both in the same manner to the register of deeds, and they are noted as received for record at the same hour and minute. The simultaneousness of these deliveries will not prevent the lien of the docketed judgment upon the land, as the land of B under A's deed to him, although delivered simultaneous with his own deed to C."

These illustrations are exactly parallel with the facts in this case, for while the parties in a land matter are not dealing with absolute title, still they are dealing with inchoate rights of property

recognized by the government, and these have to be granted or relinquished with as much formality as the transfer of title in fee between individuals.

In the case at bar Doran first relinquished his inchoate right to the land to the government, and then the government granted or conveyed this inchoate right to Moss.

But following out the analogy pursued in the illustration of the transfers between A, B and C, the government must have been reinvested with the complete title to the land before it could invest Moss with this inchoate right; and if the reasoning in the illustration cited above is good, then the complete title must have rested in the government momentarily, at least, before the government could confer upon Moss the right to acquire this inchoate right.

As long as Doran's filing was in full force and effect the government had no right or authority to permit Moss, or any one else, to file upon the land.

After Doran had been allowed a homestead entry it was necessary for him to relinquish his right and necessary for the government to *accept* the relinquishment *before* it could allow another entry on the land.

And it is utterly absurd and illogical to say that the acceptance of Doran's relinquishment and the allowance of Moss' filing were simultaneous and one and the same act, for the reason that, under the statutes of the United States, Doran's rights to the land must be completely wiped out *before* the government has any right or authority to permit any other filing. Doran's rights must absolutely *cease* before the government can allow another filing, and this could not be so if the acceptance of the relinquishment and the allowance of the subsequent filing were simultaneous and one and the same act.

The acceptance of the relinquishment by the government is a separate, distinct and independent act and cannot be fused or coalesced with the act of allowing a subsequent entry, for the relinquishment must have its full legal effect before the land officials have any right to allow a subsequent entry.

The mere fact that the physical point of time between the acceptance of the relinquishment and the allowance of the subsequent entry is so slight as to be inappreciable, or even incomprehensible, does not militate against the argument.

If in a transfer of title between three persons, as for instance from A to B and B to C the title must at some time rest in B be-

fore he can transfer it to C, then it follows as a matter of logic that the title must remain in B an actual, given length of time, however infinitesimally small it may be.

Philosophers tell us that light moves at a rate of 190,000 miles a second.

If this be true it is beyond the power of the human mind to conceive, and is beyond the ingenuity of man to devise any instrument that would measure the length of time it takes a ray of light to travel an inch.

And yet we know as a matter of logic that it must be true, that if it takes a ray of light a second to travel 190,000 miles, it must take an actual, physical point of time for a ray of light to travel the twelfth part of a foot.

It would be just as reasonable, just as logical to say that a beginning could be coincident with an end, or that three different objects could occupy the same physical point in space at the same time, as to say that A could transfer a title to B and B to C and that the divestment of title in A and the investment of title in C are simultaneous and occur at the same instant of time.

If appellee's contention is right then there was a lapse of a certain length of time between the relinquishment of Doran and the filing of Moss; and as Dowman was on the land, in the actual physical occupation of it, according to the decision of the Secretary, Dowman's settlement preceded Moss' filing by the length of time that must have elapsed between the acceptance of the relinquishment and the allowance of Moss' filing.

If Dowman had not entered on the land while it was covered by Doran's filing, but had settled on the land at the very instant that Moss offered to file, there can be no question but that Dowman would have been entitled to the preference.

The method of procedure laid down in the General Land Office Circular for 1892, p. 10, and followed in the later circulars, in cases of simultaneous applications, is as follows:

"In cases of simultaneous applications to enter the same tract of land under the homestead laws, the rule is as follows: First, where neither party has improvements on the land the right of entry should be awarded to the highest bidder. Second, where one has actual settlement and improvement and the other has not, it should be awarded to the actual settler. Third, where both allege settlement and improvements, an investigation must be had and the right of entry awarded to the one who shows prior actual

settlement and substantial improvements so as to be notice on the ground to any competitor."

We do not understand that counsel for appellant contests this, but he contends that as Dowman settled on the land while it was covered by Doran's filing he was a trespasser and thereby lost rights which he otherwise would have had, and that this act of trespass prevented him from becoming a qualified applicant for the land.

This is the reason assigned by the long list of authorities cited by counsel which uphold the "simultaneous" doctrine.

But neither has any of these authorities, nor has counsel cited us to any provision of the statutes or a decision of the courts conferring upon the officers of the Land Department the power to deprive citizens of their property, or property rights, because of crimes and misdemeanors committed by them.

Certainly the officers of the Land Department can have no such inherent power, and if they possess it at all it must have been conferred by specific authority of the lawmaking body.

Even a court of equity would possess no such power as this.

Says Story in his Equity Jurisprudence, section 182: "It is no part of the duty of courts of equity to punish parties for immoral conduct by depriving them of their civil rights."

This doctrine, contended for by counsel, and upheld by the earlier decisions of the Land Department, is a species of attainder.

But that piece of ancient legal outlawry has never been favored in this country, is constitutionally prohibited, and even in the cruel days of old was only resorted to in cases of treason and felony and not for petty misdemeanors.

Conceding that Dowman was a trespasser at the time he entered on the land, he was a trespasser only as to the government and Doran, and not as to Moss, and the trespass against Doran ceased the moment the latter's relinquishment was filed.

Judge Lochren, Record, page 48, speaking of this point, says: "That Dowman had acquired no rights by his settlement prior to Doran's relinquishment, and might as respects Doran have been regarded as a trespasser makes no difference. When Doran relinquished Dowman ceased to be a trespasser, and was not only an actual but a lawful settler. There was no evidence of mala fides about Dowman's settlement which should effect its legality when the time came for a right to attach to it under the land laws."

The act of trespass is undoubtedly an offence against the laws of the country, but the law has also specifically provided the punish-

ment therefor. The trespasser may be proceeded against criminally, or he may be prosecuted civilly for the damages sustained.

These are the only penalties provided by law, and we submit that there is no inherent power in the officers of the Land Department to deprive a man of his civil rights for the commission of the comparatively insignificant offence of settling upon government land while it is covered by the entry of another.

Counsel's apparently serious contention that such an act of trespass deprives the trespasser of the right to acquire the land trespassed upon, suggests some interesting inquiries.

If the act of trespass operates in this way, why would not the commission of any other offense operate in the same way? The act of assault and battery for instance.

Assault and battery is an unlawful act and an offense against the laws of the country. But would counsel contend that if Dowman had committed assault and battery on Doran the moment before Doran filed his relinquishment that that act would, in any way, have restricted or limited Dowman's right of entry? Hardly.

And yet, if not, why not?

The act of assault and battery would have been as heinous and as much of an offense against the laws of the country as the act of trespass.

Again, does counsel contend that the act of trespass operates to prevent the trespasser from acquiring government land generally, or only that it prevents him from acquiring the particular piece of land on which he has trespassed?

If counsel says that it only operates to prevent the trespasser from acquiring the particular piece of land upon which the trespass was committed, then the query arises, why? If the act is one that merits such condign punishment why limit it to the denial of the right to acquire the particular piece of land, instead of extending it to all public lands?

Another consideration.

Does the commission of this offense take away from the trespasser the right to acquire government land for all time or does it only deprive him of such right temporarily?

And if counsel answers that it only deprives him of the right temporarily then who is to decide when he has become sufficiently purged of his offense and in what way and by what tribunal are his rights to be restored?

In the absence of any specific provisions of statute showing how the act of trespass operates upon the right of an individual to

acquire government land, it seems to us that it is incumbent upon counsel for appellant to answer these questions.

Up to this point in the argument we have attempted to show that even if Dowman was a trespasser as to Doran it would not have deprived him of his right to the land the instant that Doran filed his relinquishment.

But we deny that Dowman was even a technical trespasser either as to Doran or the United States.

A careful examination of the Revised Statutes will disclose the fact that sections 2461 and 5388 are the only provisions of law that in anyway prohibit third persons from going upon or interfering with public lands. Both of these section refer to the destruction of timber upon public lands and, therefore, have no bearing upon the case at bar.

The effect of these sections is discussed and determined in the cases cited below, and these authorities hold that the only prohibitions against trespass upon the public lands are contained in these two sections.

Leatherbury vs. U. S. 32 *Fed. Rep.*, 780.

U. S. vs. Garretson, 42 *Fed. Rep.*, 22.

U. S. vs. Konkapot, 43 *Fed. Rep.*, 64.

If Doran had made actual settlement upon the land and had placed improvements thereon, and Dowman had then entered upon the premises and torn down Doran's fences or buildings or had destroyed his crops, undoubtedly Doran would have had a right of action for trespass.

But even such action as this upon the part of Dowman would not have been an offense against the laws of the United States, but against the laws of the State of Minnesota. Neither the land department nor the United States Courts would have had jurisdiction of such an action, but Doran would have been remitted to the state courts for his remedy.

The federal Courts have decided time and again that all improvements placed upon public lands by settlers are personal property, and that the state courts have exclusive jurisdiction of all actions involving the right of possession to such property or for injuries thereto.

But if such a trespass was in violation of the laws of the United States it would follow as a logical sequence that the federal courts would have at least concurrent jurisdiction of such offenses.

By the decision of the Secretary it appears that Doran had never made any settlement or improvement on the land. Dowman, therefore, was not even a technical trespasser under the state laws.

Counsel for appellant practically admits that if Dowman had not entered on the land while it was covered by Doran's filing, but had made made settlement the very instant that Moss offered her filing, that Dowman would have been entitled to the preference, for the reason that as between a simultaneous entry and settlement both the law and the circulars of the General Land Office favor the actual settler.

Counsel has, therefore, rested his whole case upon the proposition that Dowman's entry on the land while it was covered by Doran's entry was a trespass, a wrongful act and that by such wrongful act he was deprived of rights which he would otherwise have had, and that the land department had the right to punish him for such wrongful act by denying to him the right to file upon said land when it again became subject to entry by virtue of Doran's relinquishment.

But as we have shown that under the laws of the United States such an entry as Dowman made was not even a technical trespass; and as the land department would not have had the right to deprive him of any of the civil rights granted to him by the public land laws, even if it had been a trespass, appellant's whole case must fall to the ground.

If there ever were circumstances which would justify a person in making a settlement on government land which was already covered by filing; they certainly existed in this case.

It appears from the opening paragraph of Secretary Smith's decision, Record, p. 24, that this land was covered by the homestead filing of six different persons from February 6, 1885, to September 19, 1890, the time Doran settled on it.

It also appears from the Secretary's decision, Record, bottom of p. 27, that none of these persons entered the land in good faith, but for the purpose of speculation. It also appears on the same page that none of them had ever made any settlement upon the land whatever, and that Dowman was aware of this fact, and that was the reason why he settled upon the land, believing that that was the only way he could acquire it.

It also appears from other parts of the Record, p. 20, that he had attempted to acquire the land previous to his settlement by instituting a contest, and that this contest was still pending at the

time of his settlement in September, 1890, and was not decided until November, 1891.

It may be the policy of the government to prevent trespasses upon the public lands, but it is no less the policy of the government to prevent speculation in the public lands.

It is a perfectly warrantable conclusion from a reading of the record that none of the six persons who entered this land, previous to Dowman's settlement had the slightest idea of ever making it their home; and while the Secretary in his decision does not say so in so many words he plainly intimates that in his opinion the land had been withdrawn from the market for the purpose of speculation.

It plainly appears that at least one of these persons, Doran, received $1000 for his relinquishment, although he had never expended a dollar in improvements and for aught that appears had never seen the land.

And if Dowman had not settled upon the land and broken up this chain of speculation it might have continued yet and could have continued indefinitely.

He is the first honest homesteader that ever attempted to acquire the land and under these crcumstances we think it devolves upon counsel for appellant to show us some specific provision of law that denies to a technical trespasser the right to acquire public lands, before it can be claimed that he has forfeited his right to this land by the manner in which he attempted to gain it.

Judge Lochren in his decision, Record, p. 48, well says: "Neither Doran nor the long line of speculative homesteaders who had kept up holdings by entries and relinquishments every six months, had ever appeared on the land. The object of the homestead laws is not to encourage speculation, but settlement, and if Dowman knew all the antecedent facts, he might well expect that an actual settler would acquire the right to the land, lawfully, upon the next relinquishment, and make his settlement, as the Secretary finds as a fact that it was made, in good faith."

Counsel in his brief says: "that Moss purchased the relinquishment in good faith, and that she had no knowledge of Dowman's settlement and improvement. But under the land laws Doran had no interest in the land itself which he could transfer or assign to Moss, and even if he had, it is a principle of law too well established to require the citation of authorities to support it, that one who purchases an interest in land takes it subject to the rights of one in possession.

As we have heretofore shown, both Secretary Smith and Judge Lochren have found that the entrymen who preceded Moss had not taken the land in good faith, but for the purposes of speculating in the sale of the relinquishments.

The status of the purchaser of the relinquishments under such circumstances is thus laid down in the General Land Office Circular for 1892, page 74: "Relinquishments run to the United States alone, and no person obtains any right to the land by mere purchase of the relinquishment of a filing or entry. Entries and filings made for the purpose of holding the land for speculation and the sale of relinquishments are illegal and fraudulent, and every effort in the power of the government will be exerted to prevent such frauds and to detect and punish the perpetrators. Purchasers of the relinquishments of fraudulent filings or entries should understand that they purchase at their own risk so far as the United States is concerned, and must seek their own remedies under local laws against those who, by imposing such relinquishments upon them, obtained their money without valuable consideration."

Such being the law, appellant is hardly in a position to plead that she was a purchaser in good faith and that she was ignorant of the fact that defendant had settled on the land in question.

Another point made by counsel is that it was necessary for Dowman to have made a new and independent act of settlement, after the filing of the relinquishment, in order to enable him to initiate a right to the land.

In other words, counsel seriously contends that as Dowman's original settlement was in the nature of a trespass, and as he did not make another settlement after Doran's relinquishment, that he is not entitled to the land; but that if Dowman had stepped over the border just after Doran filed his relinquishment, and had solemnly announced, in the wilderness where he was located, that he renounced all claim to the land under his original settlement, and then had instantly returned to it with the intention of acquiring it, that he would have been rehabilitated with all the rights of citizenship.

As to what good purpose this proceeding would have subserved, or as to what mandate of the law it would have been in response to, counsel is discreetly silent.

We think it requires but little argument to show that Congress never intended to declare that it was necessary for one who was a trespasser at the time of his original settlement, to go through the idle ceremony of leaving the land and renouncing his original

settlement, after the land had again become open to settlement, in order for him to lawfully initiate a right to the land.

Such a proceeding would not advance any public or private purpose. It would not in any way have benefitted Doran; it would not have endowed Dowman with any further or addditional qualifications as a settler, and the wisdom of the public land policy of the general government would not have been demonstrated or vindicated by it, and the only possible virtue that we have been able to perceive in it is the general moral benefit that is supposed to result to the sinner from the public confession and renunciation of his criminal act.

It is inferentially held by all of the authorities upholding the "*eo instanti*" doctrine, heretofore cited, that no new act of settlement is required under such circumstances.

The following cases hold this doctrine specifically:

Kaster vs. Benz, Lester L. D. 418.

Peterson vs. Kitchen, Copps. L. O., Vol. 1-3, 181.

McAvinny vs. McNamara, 3 L. D. 553.

Counsel contends that complainant's position is sustained by Wood vs. Beach, 156 U. S., 548. The Court of Appeals in this case has completely answered this and it is not necessary for us to add anything further. See Record, p. 61.

Finally, the mistake of law on the part of the officials in the Land Department must be gross in order to justify the courts in setting aside a patent.

U. S. vs. Marshall Silver Mining Co., 129 *U. S.,* 579-32-737.

U. S. vs. Maxwell Land Grant Co., 121 *U. S.,* 325-30-958.

It seems to us, therefore, that both reason and authority sustain the position of defendant, and as it appears that this doctrine has been uniformly npheld in the department for the past fifteen years, it should be upheld by the courts even though it is considered that the department was originally wrong in taking this position, for it has passed into and become a rule of property, and there is no telling how many titles might be unsettled if the ruling of the department on this point should now be reversed.

Respectfully submitted.

CHARLES A. TOWNE,

Counsel for Appellee.

MOSS *v.* DOWMAN.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 141. Argued and submitted January 31, February 1, 1900. — Decided February 26, 1900.

Decisions of the land department in contest cases on questions of fact are conclusive.

Dowman went upon the public land in controversy, then unoccupied, on the 19th September, 1890, built a cabin and continued to live there. November 18, 1890, he made a formal homestead entry in the local land office, and after five years of continued occupancy and proof of the same he received a patent. On May 7, 1890, one Doran made a homestead entry of the same land without occupying it, which he subsequently relinquished, Moss pay-

Statement of the Case.

ing him $1000 therefor, and thereupon Moss on the 24th of October, 1890, filed that relinquishment in the local land office, and made a homestead entry in her own name. April 22, 1891, she appeared on the land, commenced the construction of a house, and occupied it when finished. A contest between the two as to which had the right to acquire title was finally settled by the Secretary of the Interior in favor of Dowman. *Held*, that the decision of the Secretary was correct.

On March 17, 1897, a patent was issued to the appellee, defendant below, for the southeast one quarter of section 22, in township 65 north, of range 4 west of the fourth principal meridian, in the State of Minnesota. Thereafter, and on March 23, 1897, the appellant, plaintiff below, filed her bill in the Circuit Court of the United States for the District of Minnesota, seeking to charge the defendant as trustee of the legal title for her benefit. To the bill as thus presented a demurrer was filed, which, on November 4, 1897, was sustained by the Circuit Court, and the bill dismissed. On appeal to the Circuit Court of Appeals for the Eighth Circuit this decree was, on June 27, 1898, affirmed, 60 U. S. App. 69, and to review this decision this appeal was taken.

The title of defendant, as disclosed by the bill and exhibits, is as follows: On September 19, 1890, he went upon the premises in controversy, then unoccupied, built a cabin, and continued to live therein (having on November 18, 1890, made formal homestead entry in the local land office) during all the proceedings in the land department, hereinafter stated, and until he had completed five years of occupancy, and then upon proof of such continued occupancy was awarded and received a patent on account of his homestead entry and occupation. The claim of the plaintiff on the other hand rests upon an entry in the land office prior to that of defendant, followed by a settlement on the land later than his. From 1885 to 1890 this tract, though never settled upon or occupied by any one, was the subject of repeated entries at the local land office, such entries being made under the homestead law, the later ones being as follows: On May 7, 1890, Robert H. Doran made a homestead entry. Subsequently, the plaintiff paid to Doran the sum of one thousand dollars for a relinquish-

ment of his homestead entry, and on the 24th day of October, 1890, she filed in the local land office that relinquishment, and at the same time made a homestead entry in her own name. On April 22, 1891, two days less than six months after her entry, she appeared on the land, with assistants, material, furniture, etc., and commenced the construction of a home, completed and occupied the same. A contest between the plaintiff and defendant in reference to the right to acquire title to this property was initiated in the local land office, and carried by appeal to the Commissioner of the General Land Office, and finally to the Secretary of the Interior, resulting in a decision by the latter on December 19, 1894, in favor of the defendant; and in pursuance thereof the patent was issued to him.

Mr. James K. Redington for appellant. *Mr. Thomas J. Davis* was on his brief.

Mr. Charles A. Towne for appellee, submitted on his brief.

Mr. Justice Brewer delivered the opinion of the court.

Repeated rulings of this court have settled that the decisions of the land department in contest cases on questions of fact are conclusive.

Defendant by taking actual possession on September 19, 1890, his entry in the land office on November 18, 1890, his continued occupation and proof thereof, was entitled to the patent which was thereafter issued to him, unless other facts found by the department show that as matter of law a superior right was vested in the plaintiff. Such facts it is contended are the successive formal entries in the land office unaccompanied by any actual possession of the land. It may be well to state some of these in detail: On May 11, 1888, following similar prior action, Lyman E. Thayer, of Wausau, Wisconsin, made a homestead entry. On November 10, 1888, one day less than six months thereafter, Thayer relinquished,

and Julia McCarty made a like entry. On May 9, 1889, one day less than six months thereafter, McCarty relinquished, and Napoleon B. Thayer made a like entry. On November 9, 1889, exactly six months thereafter, Thayer relinquished, and John A. Murphy made a similar entry. On May 7, 1890, two days less than six months thereafter, Murphy relinquished, and Robert H. Doran made a like entry. On October 24, 1890, Carrie Moss paid Doran one thousand dollars for a relinquishment of his entry, and on the same day, having obtained that relinquishment, she filed it in the land office and made her entry. Thereafter, and on April 22, 1891, two days before the expiration of six months, she went upon the land, and made improvements in the way of building and otherwise. As the Secretary says in his opinion: "Although numerous persons have made homestead entry of this land, none appear to have done so in good faith, for none appear to have made any settlement during the period of five years in which it was entered and relinquished every six months." In other words, the findings of fact made by the land department show that the first person who made actual settlement upon the premises was the defendant, that his settlement and occupation continued for the term prescribed by the statute, and therefore that such settlement and occupation thus continued entitled him to a patent unless defeated by these proceedings in the nature of entries without settlement. In respect to them it was found that for five years this tract had been subjected to repeated entries, each entry made within six months of the prior entry and accompanied by a relinquishment of such prior entry, and thus for five years the land, without any settlement, without any occupation, was a football for homestead speculators, and withdrawn from actual settlement.

Counsel for appellant thus states the question:

"The application of supposed law to this state of fact, in the determination by the Secretary of the Interior of the rights of the litigants respectively, was as follows:

"'The only question to determine in this case is, whether Dowman was a settler in good faith at the time Doran's relinquishment was placed on file in the local office. For, although

Doran's entry was erroneously allowed, being of record it segregated the land, and therefore no right could be initiated by reason of the settlement. But the instant the relinquishment was filed in the local office, the right of the settler on the land attached and an entry could not defeat it.

* * * * *

"'In view of these facts and that no evidence has been introduced which shows that Dowman's settlement was not in good faith, under the established rulings of this department the settler Dowman's rights attached instantly on the filing of Doran's relinquishment, and is therefore superior to Moss's entry.'

"Upon this application of law to ascertained facts as recited, and upon no other or different facts, patent issued to appellee as hereinbefore recited."

We are content to take this statement, and upon it are clearly of the opinion that the decision of the land department was correct. The obvious purpose of the preëmption and homestead statutes of the United States is to secure to the actual settler the land upon which he has settled, and to give him the prior right to perfect title by purchase or continued occupation. While undoubtedly under the provisions of the statutes and the regulations of the land department there are at times opportunities for a speculator to obtain title to public lands, it must be always remembered that in the eye of the public land laws of the United States the speculator is never an object of favor. Preëmption and homestead laws were enacted for the benefit of the actual settler, and to that end they should be construed and administered. The plaintiff herein contends that this tract of land was withdrawn for five years from settlement by mere successive entries in the land office, and could be kept thus withdrawn in the future indefinitely, while speculators wait such time as it becomes convenient to them to perfect title by settlement and occupation. The proposition thus made is so offensive to the spirit and purpose of the land laws of the United States that unless the statutes make such a result necessary from a true construction of their language it ought to

be rejected. Again and again has this court affirmed the proposition that the settler is the beneficiary of the preëmption and homestead laws of the United States. In *Lytle* v. *Arkansas*, 9 How. 314, 333, it was said:

"The claim of a preëmption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right. But when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hardships and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is the national feeling is shown by the course of legislation for many years."

So also in *Clements* v. *Warner*, 24 How. 394, 397:

"The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

Again, in *Bohall* v. *Dilla*, 114 U. S. 47, 51:

"Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erection of a dwelling thereon."

And again, in *Anderson* v. *Carkins*, 135 U. S. 483, 487:

"The theory of the homestead law is, that the homestead shall be for the exclusive benefit of the homesteader. . . . The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes."

These quotations might be multiplied, and nothing contradictory thereof can be found in our decisions. Their oft repetition simply accentuates the proposition heretofore stated, that the actual settler is the one for whose benefit the homestead and preëmption laws were enacted.

Counsel say that "a *prima facie* valid entry of record operates to appropriate the land covered thereby and to reserve it pending the existence of such prior entry from all subsequent disposition;" that by analogy to express statutory provisions, a homestead entry without settlement is adjudged to be operative for six months; "that from 1859 to 1885, a period of over twenty-six years, an uninterrupted chain of cases held that no right upon cancellation of an entry inured by reason of a settlement made during its existence; that to hold otherwise would be to enable a trespasser to benefit by his own wrong, and that any such pretended claim was invalid and of no effect against another entry made at the time of cancellation."

We deem it unnecessary to consider the correctness of these rulings or the power of the land department to secure to one who has made a formal entry a certain length of time in which to perfect his settlement and improvement. The Revised Statutes in terms give no such right. It is true that section 5 of the act of May 20, 1862, c. 75, 12 Stat. 392, 393, carried into the Revised Statutes as section 2297, provides —

"If at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government."

But that section simply authorizes the Government to annul an entry if thereafter it appears that the homesteader has actually changed his residence or abandoned the land for more than six months. But the very phraseology, "changing residence," "abandoning land," implies a settlement on the land which is changed and abandoned, and does not authorize a waiting for settlement and occupation. On the other hand, section 2291, Rev. Stat., providing for final proof, requires an affidavit that the applicant has "resided upon or cultivated the same for the term of five years immediately succeeding the time of filing

the affidavit." In other words, the one section contemplates an immediate settlement and occupation, and the other provides for temporary abandonment.

It is also true that on March 3, 1881, said section 2297 was amended by adding this proviso:

"That where there may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe." Act of March 3, 1881, c. 153, 21 Stat. 511.

But this contemplates a separate ruling for specific reasons in particular cases, and no such ruling was applied for in the present case. It may be argued, it is true, that in view of the practice of the department it was a Congressional recognition of its validity and an enlargement of the time in the particular cases specified.

But, as we have said, we do not feel called upon to decide upon the validity of any ruling or practice which secures to one making a homestead entry the right to perfect that entry by subsequent settlement and occupation.

In the case at bar every right which Doran possessed was ended on October 24, 1890, by the filing of his relinquishment in the local land office. The act of May 14, 1880, c. 89, 21 Stat. 140, provides: "That when a preëmption, homestead or timber culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

At the moment of filing that relinquishment, Dowman, the defendant, was a settler in occupation of the tract, and Moss, the plaintiff, made her application to enter, and the question is as to the relative rights, at the moment the land becomes open to entry, of one a settler in actual occupation and one making a formal entry in the land office. For reasons heretofore stated, we have no doubt that the settler is entitled to preference. It is true he must perfect his right of settlement by making an

entry in the land office, and section 3 of the act of May 14, 1880, 21 Stat. 140, heretofore referred to, provides:

"That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws."

Within less than thirty days from the filing of Doran's relinquishment Dowman made a formal entry in the land office, and that entry, based upon actual possession, is entitled to preference over an entry without possession.

Whenever a homestead entry has been made, followed by no settlement or occupation on the part of the one making the entry, and that homestead entry has by lapse of time or relinquishment, or otherwise, been ended, any one in actual possession as a settler and occupier of the land has a prior right to perfect title thereto. We indorse in this respect what was said by the learned judge of the Circuit Court:

"That Dowman had acquired no rights by his settlement prior to Doran's relinquishment, and might as respects Doran have been regarded as a trespasser, makes no difference. When Doran relinquished Dowman ceased to be a trespasser, and was not only an actual, but a lawful settler. There was no evidence of *mala fides* about Dowman's settlement which should affect its legality when the time came for a right to attach to it under the land laws. Neither Doran nor any of the long line of speculative homesteaders who had kept up holdings by entries and relinquishments every six months had ever appeared on the land. The object of the homestead laws is not to encourage speculation, but settlement, and if Dowman knew all the antecedent facts he might well expect that an actual settler would acquire the right to the land, lawfully, upon the next relinquishment, and make his settle-

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ment as the Secretary finds as a fact that it was made — in good faith."

For these reasons we are of opinion that the judgment of the Court of Appeals was right, and it is

Affirmed.